

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 102

PROJECT 107

**SEXUAL OFFENCES : PROCESS AND PROCEDURE
VOLUME I**

Closing date for comment:
28 February 2002

ISBN: 0-621-31809-4

CHAPTER 1

INTRODUCTION

1.1 Introduction

1.1.1 As part of an incremental approach, the South African Law Commission is releasing this discussion paper on process and procedure relating to sexual offences, the second of a four-part series, for general information and comment. The first discussion paper,¹ published in August 1999, dealt with the substantive law relating to sexual offences, while the third and fourth papers will address the controversial issues of adult prostitution and child pornography.

1.1.2 The substantive law and process and procedure relating to sexual offences should ideally not be separated or be treated in isolation and for this reason the two discussion papers will be interlinked at the consultation phase of the discussion paper on process and procedure. As a direct result of the submissions received on the discussion paper on the substantive law relating to sexual offences, the draft Bill contained in that discussion paper has been substantially revised. For this reason the revised Bill, which has now been expanded to include clauses relevant to process and procedural matters, is included in **Annexure A** to this discussion paper for comment. An explanation of the amendments to the draft Bill, with an indication of some of the respondents who influenced the Commission's thinking in a significant way, precedes **Annexure A**. The individuals, bodies and institutions who submitted comment on the discussion paper on the substantive law relating to sexual offences and the proposed draft Sexual Offences Bill, as contained in that discussion paper, are reflected in **Annexure B**. For the purpose of submissions, it is advised that the discussion papers on the substantive law and process and procedure be read together.

1.1.3 However, it is important to highlight the differences between the substantive and process and procedure branches of criminal law as this will make the reading and commentary on this paper more accessible and meaningful. Substantive criminal law deals with the definitions of crimes, general principles such as the nature of the intention required for conduct to attract a criminal sanction and what constitutes criminal capacity. Criminal procedure is that

¹South African Law Commission (Project 107) **Discussion Paper 85: Sexual Offences: Substantive Law** (hereinafter Discussion Paper 85).

branch of criminal law which prescribes the steps and procedures that must be taken in the course of prosecuting a case through the criminal justice system.

1.1.4 This paper deals with the process of managing sexual offences. It includes a discussion of the various agencies or service providers responsible for dealing with the victims and offenders of sexual offences and the procedures for disclosure, reporting, investigation, the court hearing and sentencing of the sexual offender. It should be noted that not all sexual offence cases necessarily follow all these steps or the sequence in which they are discussed. What is clear, however, is that the process involves a number of disciplines and structures. Consultation, co-ordination and an explicit interdisciplinary code of conduct are therefore crucial. Selection, screening, specialised training, debriefing and monitoring of all role-players involved in sexual offence and child abuse cases are also imperative.

1.1.5 This paper purposely contains innovative and progressive recommendations regarding changes to the criminal justice system. The intention is to encourage victims of sexual violence to approach the system for assistance and to improve the experiences of those victims who choose to enter into the criminal justice system. Also included in this paper are recommendations which are non-legislative in nature. These recommendations will deal with some of the difficulties encountered by victims of sexual violence and some of the social factors contributing to the high incidence of sexual offences. Although this falls outside the narrow scope of law reform, this investigation's extended terms of reference are explicit in this regard. It is hoped that in so doing, action will be encouraged by the appropriate government structures and that communities will be galvanised to participate in the fight against this form of violence.

1.1.6 Any reference to a sexual offence raises issues concerning terminology. The person against whom the sexual offence has been committed is often referred to as the 'victim', 'survivor'² or 'complainant'. The term used to describe the person who commits a sexual

²Stanton, Lochrenberg and Mukasa **Improved Justice for Survivors of Sexual Violence?** Cape Town: Rape Crisis 1997 p. 8, footnote 7 prefer the term 'survivor' The authors say: 'The term "survivor" encompasses the notion that recovery is a process of moving from a passive sense of being a helpless "victim" back into a sense of dignity and self-worth. It emphasises the adaptive strengths of women who have experienced a life-threatening situation, unlike the term "victim" which traditionally portrays women as passive targets of male violence'.

offence also varies. To avoid the confusion of using multiple terms, the terms 'victim', 'complainant' and 'offender' will be used in this paper.

1.1.7 A comprehensive exposition of the origin of and background to this investigation can be found in the issue paper on sexual offences against children³ and the discussion paper on the substantive law relating to sexual offences.⁴

1.2 General comment

1.2.1 A plethora of workshops, conferences, brainstorming sessions and the like have intensely debated issues relating to the review of the existing legal framework on sexual offences and how co-operation among all role-players can be maximised. The lobby for more effective management of sexual offence cases resulted in the establishment of a specialised sexual offence court in Wynberg, Western Cape in 1993. A National Task Team has since been established by the Department of Justice and Constitutional Development with the aim of extending these specialised courts to every other regional court, nationally. This includes training justice personnel and other stakeholders to handle sexual offence matters more effectively. Other government departments have embarked on related initiatives of their own.

1.2.2 The aim of this paper is to review investigative and court practices, both past and present, and to table the differing ideas and opinions relating to the 'best management' of sexual offences. The Commission has attempted to synthesise the theory and practical reality facing victims of sexual offences into workable and enforceable legislative and non-legislative reforms that will protect victims of sexual violence, protect the rights of the offender, minimise trauma as well as facilitate, where possible, processes of healing of the victim and rehabilitation of the offender.

1.2.3 Where possible each section in the discussion paper will follow the following format: introduction (usually containing a statement of the problem), current law, submissions received, comparative analysis, evaluation and recommendations.

³South African Law Commission (Project 107) **Issue Paper 10: Sexual Offences Against Children** (hereafter Issue Paper 10).

⁴Discussion Paper 85, Chapter 1.

1.2.4 This discussion paper contains material which may be viewed as being unduly critical of either systems, agencies involved, procedures or the general state of the process through which the sexual offence victim must move. This is inevitable in any major overhaul of a system that has been established on premises that are now recognised as incorrect, unfair or unjustly prejudiced.

1.2.5 Although there are many issues requiring change, either due to problems in relation to content or in implementation, the Commission wishes to place on record that many individuals involved in the system are deeply committed to combating sexual violence. On a daily basis these individuals go way beyond the call of duty to assist victims as much as they are able to. For this courage and commitment we salute them.

1.3 **The Commission's working methodology**

1.3.1 This discussion paper presents the current thinking and opinion of the Commission on the process and procedure relating to sexual offences as it has been informed by research and consultation at local, national and international levels, as well as the workshopping process and by the submissions received. However, at this stage the proposals put forward are still tentative and may be influenced by further consultation and submissions on the proposed reforms.

1.3.2 The Commission invites submissions and discussion on the proposals presented in this discussion paper and the draft legislation. As stated, the views contained in this discussion paper are not the Commission's final views and the discussion paper is published precisely to elicit public comment with a view to compiling a final report and finalising the draft legislation. This discussion paper will be workshopped in the same way as the discussion paper on the substantive law relating to sexual offences has been and interested parties are invited to avail themselves of the opportunity to influence the drafting of legislation at this early stage.

1.3.3 After submissions and input from the consultation process have been integrated into the proposals and draft legislation, a report will be prepared which will be submitted to the Minister for Justice and Constitutional Development for consideration. The Commission and members of the Project Committee on Sexual Offences would once again like to thank all workshop participants and all those who made submissions in response to the Issue Paper and the discussion paper on the substantive law relating to sexual offences for their invaluable

contribution to this process.

1.3.4 In developing its recommendations to improve the process for victims of sexual offences, the Commission has been mindful of the following considerations:

- * Proposals that require substantial additional resources are unlikely to be viable in the current economic climate. Therefore the main focus should be on identifying ways in which existing agencies and processes can be made to work more effectively.

- * Measures requiring legislation should be kept to a minimum.

1.3.5 The primary objective of reform should be to ensure that it is implemented 'on the ground' and that organisational practices are modified accordingly. Sometimes legislation is necessary to achieve these changes, but mostly it is a very blunt instrument. By its nature, legislation must be couched in reasonably general terms, leaving it up to the agencies affected to translate these general directives into specific rules, procedures and routines. The statute books are littered with provisions that have never been properly implemented because, once the legislation was adopted, nobody bothered to make the necessary adjustments at the level of organisational practice. Another limitation of relying on legislation is that the legislative process is slow and somewhat unpredictable. Moreover, legislation and associated regulations can be difficult to adjust to changing circumstances. For these reasons, the Commission believes it would be far more productive for all the relevant agencies involved to concentrate on developing detailed policies and protocols for modifying existing practices and coming to an agreement to institute these changes than to pursue separate legislative options.

CHAPTER 2

THE UNDERLYING PRINCIPLES FOR THE MANAGEMENT OF SEXUAL OFFENCES, PROTOCOLS AND CODES OF GOOD PRACTICE, AND CASE MANAGEMENT

2.1 Introduction

2.1.1 In this Chapter three interrelated issues are dealt with: the principles underlying the management of sexual offence cases, protocols or codes of good practice as a strategy for multi-disciplinary intervention in sexual offence cases and case management.

2.2 The underlying principles for the management of sexual offence cases

2.2.1 As is stated in Discussion Paper 85,¹ a set of principles has been developed for the purpose of guiding any person involved in the management of sexual offences. This set of guiding principles was originally developed to cater for children and has subsequently been expanded to include adult victims and sexual offenders. These principles are now taken one step further after considering the submissions made.

2.2.2 The principles were derived from key international instruments and national documents. These includes the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter called CEDAW), the UN Declaration on the Elimination of Violence Against Women, the Beijing Platform for Action, the African Platform for Action, the Addendum to the 1997 SADC Declaration on Gender and Development, the African Charter on Human and People's Rights, the Women's Charter for Effective Equality, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the South African Constitution and other South African policy and protocol documents.²

2.2.3 For the benefit of the reader the amended principles contained in the Discussion Paper on Substantive Law are repeated. The principles read as follows:

¹Chapter 2. See also Chapter 2 of Issue Paper 10.

²The reader is referred to Discussion Paper 85 for a more detailed exposition of these instruments.

Any person involved with the management of sexual offences shall be guided by the following principles:

1. The best interests of the child shall be paramount in all matters concerning the child.
2. Restorative and rehabilitative alternatives shall be prioritized and applied unless the safety of the child and community requires otherwise.
3. To ensure the avoidance of systemic secondary victimisation of victims of sexual offences with the development and implementation of procedures to protect victims and by the establishment of an inter-sectoral, inter-disciplinary approach to the management of all sexual offences.
4. All professionals and role-players involved in the management of sexual offences should be properly and continuously trained after going through a proper selection and screening process.
5. Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, gender, ethnic or social origin, sexual orientation, age and developmental level, physical or mental disability, religion, conscience, belief, culture or language.
6. The vulnerability of children entitles them to speedy and special protection and provision by all disciplines and involved parties during all phases of the investigation, the court process, and thereafter, including the implementation and implications of sentencing the sexual offender.
7. Victims have the right to express an opinion, to be involved in all decisions, and to have their opinion taken seriously in any matter affecting them.
8. Together with all due process and constitutional rights, victims have these additional rights:
 - a. To have present at all decisions affecting them a person or persons important to their lives.
 - b. To have matters explained to them in a clear understandable manner appropriate to their age and in a language which they understand.
 - c. That children may remain in the family during the investigation and whilst awaiting a final resolution of the matter and to periodic review of the placement.
 - d. To have procedures dealt with expeditiously in time frames appropriate to that victim and the offence.
 - e. The right to legal representation in civil, criminal, and administrative proceedings.
9. The family and the community are central to the well-being of the child. Therefore in any decisions consideration should be given to:
 - a. Ensuring that the family, community and other significant role-players are consulted in all decisions relating to the child.
 - b. How decisions affecting the offender will affect the child, family and community.
 - c. The particular relationship between the offender and the child.
 - d. Keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.
10. A person who commits a sexual offence must be held accountable for his or her actions and should be encouraged to wholly accept responsibility for his or her behaviour.
11. In deciding sanctions for a person who has been found guilty of committing a sexual offence:

- a. The sanctions applied should ensure the safety and security of the victim, family and community;
 - b. The sanctions should promote the restoration of the victim, family and community.
- In addition
- c. The young sexual offender bears special consideration in respect of sanctions and rehabilitation.
 - d. In considering the long-term goal of safety and security of victims, families and communities, the possibility of rehabilitating the sexual offender must be considered.
 - e. The interests of the victim must be considered in any decision regarding sanctions.
12. In all actions, in the investigation, the procedures, penalties and other actions, there should be awareness of, respect for, and cognizance taken of the needs, values and beliefs of particular cultural and ethnic groups applicable to the victim, the offender, and to their communities.
 13. The victim has the right to confidentiality and privacy and to protection from publicity about the offence.
 14. The victim and family are entitled to receive such therapeutic assistance as is necessary to promote healthy functioning. Where possible the offender should make a financial or material contribution to such assistance.
 15. Victims should be treated with compassion and respect for their dignity.
 16. Victims should be ensured access to the mechanisms of justice.
 17. Victims should be informed of their rights and the procedures within the system which affect them.
 18. Victims should be provided proper assistance throughout the legal process.
 19. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents.
 20. Government should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.
 21. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community based and other means.

2.3 Discussion of the principles

2.3.1 While some submissions received on the discussion paper on the substantive law endorse the need for the principles as they are,³ others are of the opinion that certain inclusions, exclusions and amendments should be made. The submissions to the discussion paper on the substantive law are dealt with under the relevant principles.

2.3.2 *Principle 1: The best interests of the child shall be paramount in all matters*

³Kuils River Support Group; Ms Phirosaw Camay; Ms Lynne Cawood.

concerning the child

2.3.2.1 **Adv K Worrall-Clare** recommends that the doctrine of the best interests of the child be qualified judicially by amending section 28 of the Constitution, so as to direct both the interpretation and application of law in this regard. We do not support this contention.

2.3.2.2 Constitutional guarantees such as those contained in section 28 of the Constitution are traditionally open-ended guarantees and are defined in an open manner. Qualifications of these rights are avoided as far as possible and reliance is placed upon the general limitations clause to deal with any restrictions which are placed upon fundamental rights.⁴ Section 39 of the Constitution confirms this interpretation by exhorting the courts to seek and discover the values underlying the Bill of Rights in interpreting its provisions. In order to apply the doctrine of the best interests of the child, the judiciary is obliged to give content to this doctrine and thereby qualify it. In so doing the judiciary is enjoined to have regard to public international law and may also consider comparable foreign case law.⁵ The interpretation and application of the doctrine of the best interests of the child will of necessity be directed by such international law and, where applicable, case law. Sexual offences legislation could further assist the judiciary in delineating the content of the doctrine by, for example, including a provision that obliges the judiciary to obtain multi-disciplinary input in order to determine what is in the best interests of a child.

2.3.2.3 **We confirm our previous recommendation⁶ wherein we stated that amendments to section 28 of the Constitution are not necessary or warranted at this stage. We believe the constitutional protection accorded to children is flexible and strong enough to allow our courts to interpret legislation such as the Sexual Offences Act in the 'best interests of the child'. To make this very clear, the preamble to the Sexual Offences Act could refer to the constitutional protection accorded to children and the principle that the best interests of children shall be paramount in every proceeding involving a child.**

⁴D A Basson **South Africa's Interim Constitution Text and Notes** Cape Town: Juta 1994.

⁵Chaskalson *et al* **Constitutional Law of South Africa** Cape Town: Juta 1996, p. 11-6 *et seq.*

⁶See paragraph 2.2.6.1 of Discussion Paper 85.

2.3.3 ***Principle 3: Avoidance of secondary victimisation***

2.3.3.1 The opinion is voiced that although submissions called for a code of conduct for interdisciplinary teams there is no difference between the final wording of the principle and the earlier formulation.⁷ The wording of this principle does seem confusing and it is recommended that it be revisited.

2.3.3.2 We therefore recommend the following amendment to this principle:

In order to avoid systemic secondary victimisation of victims of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach must be followed.

2.3.4 ***Principle 5: Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, sexual orientation, age and developmental level, physical or mental disability, religion, conscience, belief, culture or language.***

2.3.4.1 **Ms Susan Manson and Ms Linzi Fredman**⁸ propose that the protection provided for by principle 5 be extended to adult victims with intellectual disability. They justify such an inclusion on the grounds that most of their clients function intellectually and adaptively at the age levels of very young children. This level of functioning results in their presenting as witnesses in as vulnerable a situation as children. They further argue that in accordance with the principle of non-discrimination against victims on the basis of disability, this protection should be extended to adults with intellectual disability where it is deemed appropriate to maximise their potential to give evidence as competent witnesses. It is also pointed out that the word 'gender' appears to have been omitted.

2.3.4.2 There is considerable merit in the submission and we accordingly recommend that the word 'gender' be included. We further confirm that the protection against discrimination

⁷Johannesburg Child Welfare Society.

⁸Clinical psychologists, Cape Mental Health.

on the basis of a person's physical or mental disability would extend to adult victims. We therefore propose that the principle be reworded as follows:

Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, gender, sexual orientation, age and developmental level, physical or mental disability, religion, conscience, belief, culture or language.

2.3.5 *Principle 8: Together with all due process and constitutional rights, victims have these additional rights:*

2.3.5.1 **Adv K Worrall-Clare** recommends that in addition to the listed procedural rights for victims, principle 8 and more specifically the right to be present at all decisions affecting them, be expanded to include addressing the presiding officer of judicial proceedings (in particular criminal proceedings) before sentencing an accused. In this way the victim, or his or her guardian, can appeal to the presiding officer to consider certain factors before passing sentence. He further states that he supports the inclusion of a victim being entitled to 'legal representation' but acknowledges the state's inability to provide such. He is convinced that such an obligation will be rejected by the legislature.

2.3.5.2 Bearing in mind that not all procedural rights need to be listed as individual principles, it is suggested that addressing the presiding officer before sentencing already forms part of principle 7 which provides that victims have the right to express an opinion, to be involved in all decisions, and to have their opinion taken seriously in any matter affecting them.

2.3.5.3 Owing to the fact that the discussion contained in Chapter 16 below on legal representation has culminated in a recommendation not to provide for legal representation for complainants of sexual offences, principle 8 (e), which provides for the right to legal representation in civil, criminal, and administrative proceedings, falls away.

2.3.6 *Principle 10: A person who commits a sexual offence must be held accountable for his or her actions and should be encouraged to wholly accept responsibility for his or her behaviour.*

2.3.6.1 **Ms W L Clark** states that however laudable principle 10 is in essence, it may

prove to be totally unworkable in the majority of cases as offenders generally do not want to accept responsibility for their behaviour. The **Office of the Provincial Head Detective Services, SAPS, Western Cape**⁹ is of the opinion that this principle violates the constitutional rights of the accused to remain silent, not to be compelled to supply the prosecuting authority with self-incriminating evidence, and the right to a fair trial and cannot be supported. The respondent accordingly proposes that principle 10 be limited to apply only to **convicted** sexual offenders.

2.3.6.2 It is true that not much can be done to encourage perpetrators of acts of sexual violence - even those convicted - to accept responsibility for their wrongful actions. This should not, however, discourage us from stating, as a principle for the management of sexual offences, that persons who commit sexual offences should be held accountable for their actions. Given the possibility of diversion and treatment, it is also not necessary to limit the operation of this principle to **convicted** sexual offenders. Indeed, given the low number of convictions at present, it might actually be more beneficial to victims who remain outside the system if more offenders accept responsibility for their actions and change their behaviour accordingly. Provided it is clear that this principle allows for the possibility that an offender may take responsibility for his or her actions outside of the formal criminal justice system, **no amendment to this principle is recommended.**

2.3.7 ***Principle 11(d): In considering the long-term goal of safety and security of victims, families and communities, the possibility of rehabilitating the sexual offender must be considered.***

2.3.7.1 **Ms W L Clark** expresses doubt as to how easily these offenders may be rehabilitated. She opines that the implications of this in the context of placing the victim and perpetrator back together in a domestic relationship at some later stage are both severe and enormous. We share this concern, but wish to point out that we regard the rehabilitation and treatment of sexual offenders as primary mechanisms to protect the long-term safety and security of not only the immediate victim but of other potential victims and the community in general.

2.3.7.2 However, as principles 14, 19, 20 and 21 also deal with sanctions for offenders

⁹Director L Knipe signed the submission.

it is suggested that these principles be integrated into principle 11. We therefore recommend that principle 11 read as follows:

In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence:

- a. The sanctions applied should ensure the safety and security of the victim, the family of the victim and the community.
- b. The sanctions should promote the restoration of the victim, the family of the victim and the community, and this may include material, medical or therapeutic assistance.
- c. Where appropriate, offenders must make restitution (which may include material, medical or therapeutic assistance) to victims and their families or dependents.
- d. The child sexual offender should bear special consideration in respect of sanctions and rehabilitation.
- e. In considering the long-term goal of safety and security of victims, their families and communities, the possibility of rehabilitating the sexual offender must be considered.
- f. The interests of the victim must be considered in any decision regarding sanctions.

2.3.8 Principle 12: Cultural diversity shall be taken into account in all matters pertaining to the victim, offender and to their communities.

2.3.8.1 **Ms W L Clark**, a senior public prosecutor, states that applying this principle literally or liberally is also fraught with danger. She illustrates her point by referring to a significant number of serious cases of rape involving young children - approximately five years of age - which saw the mother approaching her to withdraw the matter as the mother had received a goat as damages from the perpetrator or his family. These mothers were convinced that everything was all right and were very happy with the 'compensation' they had received. **Ms Clark** argues that seemingly this practice of paying a goat as damages has cultural roots, but takes no cognizance of the anguish suffered by the child who has been raped, nor of his or her need to be protected against further abuse in the future. She therefore opines that this principle is fraught with the potential to result in miscarriages of justice and she advises extreme

caution in applying it as the best interests of the child may well not be compatible with traditional cultural beliefs. She further says traditional cultures tend to be paternalistic and male-dominated. This has further implications for the victim, who is usually female and, because of her sex and age, the most disempowered member of both her family and her community.

2.3.8.2 While cognisance is taken of the abovementioned view, acknowledging cultural diversity may also be to the benefit of the victim. On the one hand certain customary practices such as cleansing rituals need to be recognised by the courts as abuse. On the other hand issues relating to re-integration into and a sense of belonging to a community become pertinent.

2.3.8.3 Implied in the text of this principle is the fact that the existence of cultural practices is no justification for or licence to commit a sexual offence. It is recommended that this principle be amended to state this fact clearly. Accordingly we recommend:

Cultural diversity must be taken into account in all matters pertaining to the victim, offender and to their communities. The existence of cultural practices is no justification for or licence to commit a sexual offence or to exclude a criminal justice process.

2.3.8.4 Although an alternative has been recommended, the necessity or desirability of including this clause in this set of principles remains open for comment.

2.3.9 ***Principle 13: The victim has the right to confidentiality and privacy and to protection from publicity about the offence.***

2.3.9.1 **Ms Lynne Cawood**¹⁰ is of the opinion that the confidentiality and privacy of victims of sexual offences need **more** protection. She says the principle of confidentiality should ensure that all sexual offence court hearings are held in camera when victims are present; that children are accommodated in a room separate from the court and interviewed by a trained mediator; that the victim's testimony be video-taped and played in the courtroom; that the victim's identity or anything that will reveal her or his identity not be reported; and that reporting to the South African Police Service be done in a private room. With regard to perpetrators she opines that they need **less** protection of their rights to privacy and

¹⁰Director, Childline Gauteng.

confidentiality. She maintains that the names of all persons found guilty of sexual offences, especially of children, be placed on a register accessible to the public; that the perpetrator be served with an interdict forbidding him or her to be in a certain radius of the child victim, especially in cases of intra-familial abuse; that the perpetrator and not the child victim should be the person removed from the family if possible; and that bail should only be granted to alleged perpetrators in cases where there are extenuating circumstances.

2.3.9.2 We believe the present wording of principle 13 succinctly ensures the victim's right to privacy and confidentiality. The inclusion of offender registers is a contentious issue which is dealt with specifically in a later chapter.¹¹

2.4 Evaluation

2.4.1 Principles should by nature underlie all legislative reform and should serve as a yardstick for all role-players involved in the field of sexual offences when dealing with victims of sexual offences. Such principles should focus on victims of sexual violence regardless of age or gender, provided special additional provision is made for the protection of children where appropriate. It is also important to note that such principles should not only underlie the substantive law, but also, and perhaps more importantly, the process and procedural law aspects. Obviously the ideal is to have one set of principles underlying both the substantive and procedural law aspects of new legislation.

2.4.2 We are of the opinion that there is broad consensus that the principles, as defined and refined above and previously discussed, reflect what most people believe the main principles underlying such new legislation should be. The challenge is to reduce the principles to their key elements for incorporation in such legislation. However, it is necessary, first, to consider the manner in which such principles can be incorporated.

2.4.3 One option is to incorporate the principles in the preamble of the new Act. Although the preamble strictly speaking has little legal effect, it nevertheless places the new Act in context and indirectly influences and permeates the interpretation given to each provision of

¹¹See chapter 43 below.

the Act.¹² Another option could be to include the principles as a substantive legal provision in the Act. If this option is favoured the principles could be stated as obligations, non-compliance with which would lead to enforceable criminal sanctions. Principles can also be incorporated into legislation by reference. The principal Act, for instance, could provide for the drafting and enactment of a memorandum or code of conduct for service providers. Such memorandum or code could easily embody a set of principles. Structured appropriately, this option could entail serious consequences for non-compliance.¹³ It is also possible to include the principles in a separate charter for the management of victims of sexual offences.

2.4.4 Having considered the various options, the Commission is of the opinion that the principles for the management of sexual offences as developed can best be embodied in the new Sexual Offences Act as a substantive clause. This was also done in the Juvenile Justice investigation.¹⁴ Clause 5 of the draft Child Justice Bill reads as follows:¹⁵

Principles

5. Any court or person exercising any power conferred by this Act or by section 20 of the Black Administration Act, 1927 (Act No. 38 of 1927) must be guided

¹²It is a well-established principle of the common law that reference to the preamble of a statute is a permissible, if limited, guide to the meaning of that statute: **Mathebe v Regering van die Republiek van Suid-Afrika en andere** 1988 (3) SA 667 (A) at 689D - 692D; **Kauesa v Minister of Home Affairs & others** 1995 (1) SA 51 (Nm) at 81C - 82C, 1995 (3) BCLR 1 (Nm); G E Devenish **Interpretation of Statutes** 102 - 105; L C Steyn **Die Uitleg van Wette** (5th edition) 145 - 146. There are, however, clear differences between statutory interpretation and constitutional interpretation. See Chaskalson *et al* **Constitutional Law of South Africa** 11-10 *et seq* in this regard.

¹³Section 18 of the **Domestic Violence Act** 116 of 1998 obliges the National Director of Public Prosecutions to determine prosecution policy and to issue policy directives. It also obliges the National Commissioner of the South African Police Service to issue national instructions to the police relating to domestic violence and to submit such instructions to Parliament. Non-compliance of the national instructions leads to specific sanctions, for example a disciplinary hearing. Greater accountability is ensured by legislating the creation of and parliamentary monitoring of such policy.

¹⁴South African Law Commission Project 106: Juvenile Justice.

¹⁵**Report on Juvenile Justice**, July 2000.

by the following principles:

- (a) A child who is subject to procedures in terms of this Act must be given an opportunity to respond before any decision affecting him or her is taken.
- (b) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and allowed to speak in the language of choice through an interpreter, if necessary.
- (c) Children should be treated in a manner which takes into account their cultural values and beliefs.
- (d) All procedures in terms of this Act must be conducted and completed speedily.
- (e) Every child has the right to maintain contact with family, and to have access to social services.
- (f) Parents and families have the right to assist their children in proceedings under this Act and wherever possible to participate in decisions affecting them.
- (g) All consequences arising from the commission of an offence by a child must be proportionate to the circumstances of the child, the nature of the offence and the interests of society, and a child must not be treated more severely than an adult would have been in the same circumstances.
- (h) A child lacking in family support, or educational or employment opportunities must have equal access to available services and every effort must be made to ensure that children receive equal treatment when having committed similar offences.

This seems to be a modern trend and provision has been made for the inclusion of principles in a number of recent statutes.¹⁶

2.4.5 We accordingly recommend the inclusion of the principles for the management of sexual offence cases as a substantive clause in the new Sexual Offences Act. Our proposal reads as follows:

Guiding principles

¹⁶See, for instance, section 2 of the **National Forest Act** 84 of 1998 (Objectives and principles); section 2 of the **Marine Living Resources Act** 18 of 1998 (Objectives and principles); section 4 of the **Promotion of Equality and Prevention of Unfair Discrimination Act** 4 of 2000 (Guiding principles); section 10 of the **Promotion of Access to Information Act** 2 of 2000 (Guide on how to use the Act); etc. See also section 2 of the **Preferential Procurement Policy Framework Act** 5 of 2000 (Framework for implementation of preferential procurement policy); section 2 of the **Correctional Services Act** 111 of 1998 (Purpose of the correctional system); section 2 of the **Executive Members' Ethics Act** 82 of 1998 (Code of ethics).

- (1) In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles shall apply:
- (a) Victims may not be discriminated against, either directly or indirectly, on the grounds of race, colour, ethnic or social origin, gender, sexual orientation, age and developmental level, physical or mental disability, religion, conscience, belief, culture or language.
 - (b) Victims must be treated with compassion and respect for their dignity.
 - (c) Victims must be ensured access to the mechanisms of justice.
 - (d) Victims must be informed of their rights and the procedures within the criminal justice system which affect them.
 - (e) Victims have the right to express an opinion, to be involved in all decisions, and to have their opinion taken seriously in any matter affecting them.
 - (f) In addition to all due process and constitutional rights, victims have the following rights:
 - (i) To have present at all decisions affecting them a person or persons important to their lives;
 - (ii) To have matters explained to them in a clear, understandable manner appropriate to their age and in a language which they understand;
 - (iii) To remain in the family during the investigation and whilst awaiting a final resolution of the matter and, if a child is removed from the family, to have the placement periodically reviewed;
 - (iv) To have procedures dealt with expeditiously in time frames appropriate to the victim and the offence.
 - (g) Victims have the right to confidentiality and privacy and to protection from publicity about the offence.
 - (h) Victims and their families are entitled to receive such therapeutic assistance as is necessary to promote healthy functioning. Where possible the offender should make a financial or material contribution to such assistance.
 - (i) Where a child is involved, the best interests of the child shall be paramount in all matters concerning that child.

- (j) The vulnerability of children entitles them to speedy and special protection and provision of services by all disciplines and involved parties during all phases of the investigation, the court process, and thereafter, including the implementation and implications of sentencing the sexual offender.**
- (k) Since the family and the community are central to the well-being of a child consideration should be given, in any decisions affecting a child, to -**

 - (i) ensuring that the child’s family, community and other significant role-players are consulted;**
 - (ii) the extent to which decisions affecting the offender will affect a child, his or her family and community;**
 - (iii) the particular relationship between the offender and a child;**
 - (iv) keeping disruptive intervention into child, family and community life to a minimum in order to avoid secondary victimisation of the child.**
- (l) Restorative and rehabilitative alternatives must be prioritized and applied unless the safety of the victim and community requires otherwise.**
- (m) A person who commits a sexual offence must be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour.**
- (n) In determining appropriate sanctions for a person who has been found guilty of committing a sexual offence:**

 - (i) The sanctions applied must ensure the safety and security of the victim, the family of the victim and the community;**
 - (ii) the sanctions must promote the restoration of the victim, the family of the victim and the community;**
 - (iii) where appropriate, offenders must make restitution (which may include material, medical or therapeutic assistance) to victims and their families or dependents;**
 - (iv) the child sexual offender should bear special consideration in respect of sanctions and rehabilitation;**
 - (v) in considering the long-term goal of safety and security of victims, their families and communities, the possibility of rehabilitating the sexual offender must be considered;**
 - (vi) the interests of the victim must be considered in any decision**

regarding sanctions.

- (o) In order to avoid systemic secondary victimisation of victims of sexual offences, binding inter-sectoral protocols following an inter-disciplinary approach must be followed.**
- (p) All professionals and role-players involved in the management of sexual offences must be properly and continuously trained after going through a proper selection and screening process.**
- (q) Cultural diversity must be taken into account in all matters pertaining to the victim, the offender and to their communities. The existence of cultural differences is no justification for or licence to commit a sexual offence or to exclude a criminal justice process.**

2.5 A strategy for the multi-disciplinary intervention of sexual offences (Protocols and Memoranda or codes of good practice)

2.5.1 The South African government has made a particularly strong commitment towards women and children and more specifically committed itself to the promotion and protection of the rights of victims (male and female) of sexual crimes. A number of national strategies¹⁷ and programmes as well as provincial and regional protocols (standard guidelines and intervention procedures) relating to victims of abuse and specifically abused and neglected children¹⁸ have been developed. A brief exposition¹⁹ of these initiatives is given in Discussion Paper 85. However, despite mounting public and official concern about sexual offences and specifically rape, South Africa has no clear strategy for dealing inclusively with child and adult victims of sexual offences, either on a primary preventative level or on a secondary protective level. No official uniform standardised procedures, guidelines or management protocols exist for dealing with victims of sexual offences or with sexual offenders.²⁰ Existing services are mostly fragmented and under-resourced. No uniform inter-sectoral training exists in order to equip people in the various disciplines to deal with complaints of a sexual nature.²¹ There is

¹⁷A prime example of such a strategy is the proposed National Strategy on Child Abuse and Neglect (NSCAN) which has been drafted by the National Committee on Child Abuse and Neglect (NCCAN). Although this strategy has not been officially acknowledged by Cabinet yet, it is important to note that it already addresses sexual abuse of children. Similarly a strategy regarding rape has recently been commissioned by Cabinet.

¹⁸The NSCAN specifically identifies the commercial sexual exploitation of children.

¹⁹See par 1.3 of Discussion Paper 85.

²⁰The National Policy Guidelines for Victims of Sexual Offences is an attempt to establish such standard uniform guidelines. Unfortunately these guidelines fall short of doing so, as certain disciplines have remained noncommittal and only broadly formulate what should be done when confronted by a victim of a sexual offence.

²¹Government departments such as SAPS and Justice do have in-house training for persons dealing with sexual offences. The training within SAPS is currently being upgraded to accredited modules. Presently no member of SAPS may investigate a sexual offence without undergoing specialised training in sexual offences. The NDPP have also recently embarked on *ad hoc* training which will develop into an inter-sectoral training program aimed at prosecutors, magistrates, police, medical practitioners and non-governmental organisations involved in dealing with victims of sexual offences. At this point in time this training is not a

therefore no guarantee that a victim of a sexual offence entering the system will be dealt with in terms of acceptable procedures or be protected from further harm.

2.5.2 Initiatives to address this state of affairs are mushrooming. Some are driven by specific government departments or by specially appointed committees or task teams, and others are driven by non-government organisations or concerned individuals or victims. Some of these initiatives are bearing fruit,²² while others fall by the wayside due to a lack of resources, lack of capacity or burnout.

2.5.3 Human Rights Watch / Africa states²³ that the effectiveness of the law depends on co-operation and co-ordination among implementing law enforcement, judicial and social service agencies. To this end extensive consultation within various networks concerned with rape and violence against women have produced numerous resolutions and recommendations. The need for co-ordination, a structured channelling of efforts and official endorsement of an acceptable and binding procedure to be followed by all role-players is clear.

2.5.4 Opinions abound as to the strategy that should be followed. **Mr Neil van Dokkum** has suggested that service co-ordination or agency co-operation must be regulated by statute rather than protocol as it is generally easier to force people to adhere to a statute than to a protocol. **Mr Van Dokkum** says we must not fool ourselves by assuming that the various agencies will happily co-exist, hence the suggestion that a statutory obligation to co-operate within statutory time-frames be enacted.²⁴ Alternatively, the view²⁵ is held that obligatory protocols should be included in a memorandum of good practice and that the latter should be provided for in the new sexual offence legislation. Despite the difference in opinion regarding the vehicle to be used, the emphasis is on a common goal, i.e. the development and

prerequisite for being allowed to work in this field.

²²The rolling out of special sexual offence courts by the National Task Team on Sexual Offences and the NDPP is an example of such visible delivery.

²³**Violence Against Women in South Africa** New York: Human Rights Watch 1995, p. 10.

²⁴The discussion document on rape commissioned by the Deputy Minister for Justice and Constitutional Development in 1998 should be seen for an expansion of this argument linked to criminal liability for failure to comply with duties.

²⁵**Ms Joan Van Niekerk**, Childline, KwaZulu Natal.

implementation of the multi-disciplinary management of sexual abuse, including joint investigations and consultations by and training of the police, prosecutors and social workers. The aim is to prevent secondary abuse of victims of sexual offences, as well as to maximise the inherent potential of the systems involved, to effect positive overall changes in the families affected, the manner in which the offender and the community functions in relation to the abuse and the protection of victims of sexual offences.

2.5.5 Bearing in mind that approaches to intervention which may be fully appropriate to one region may be unsuitable to another, it is suggested that a national strategy for multi-disciplinary intervention relating to sexual offences provide for the development of a framework which establishes the basic criteria and procedures for interdisciplinary co-ordination and effective management, delineates professional roles and responsibilities and provides for minimum intervention procedures to be included in provincial or regional multi-disciplinary agreements of practice. As South Africans represent diverse cultures and originate from diverse geographical contexts, it cannot be expected of a framework of this nature to be prescriptive in all matters relating to the management of sexual offence cases. The ideal is that the national framework should lay down a firm and non-negotiable foundation from which provincial and regional multi-disciplinary agreements of practice can be developed. Urban and rural environments, cultural issues, and local resources are all factors which will have to be taken into account on this level. Although such a framework should accommodate this diversity, it should not compromise the principle that the basic rights of victims of sexual offences must be upheld regardless of where they find themselves.

2.5.6 An overarching framework of this nature will of necessity have to ensure that the responsible sectors plan, budget for and co-ordinate their activities at every level to ensure the consistent implementation of the framework. Due to the fact that the backbone of the investigation of sexual offences and the prosecution of sexual offenders are officials employed by government departments, it is suggested that these processes be led and resourced by government but undertaken in partnership with other stakeholders.

2.5.7 **Dr Rose September** states in her doctoral thesis²⁶ that protocols alone cannot eradicate and solve all the problems. For this reason, a national strategy which includes

²⁶R September 'The development of a protocol for the management of child abuse and neglect' University of the Western Cape 1998.

legislation that supports and enforces all aspects of a national framework on sexual offences, and which is accompanied by specific accountability and measuring mechanisms for enforcement, is vital to the effective management of sexual offence cases. Without an implementable strategy the framework and subsequent multi-disciplinary agreements will be relegated to an expression of good intentions and be filled with value-laden statements, eventually meaning very little, if anything, to the very victims it seeks to assist.

2.5.8 Experience has shown that where external measures of accountability and enforcement are not in place, multi-disciplinary agreements of this nature remain largely unenforced. A case in point is the National Policy Guidelines for Victims of Sexual Offences drafted under the auspices of the Department of Justice. The Department of Justice convened a high-level inter-sectoral Task Team in 1996 to develop uniform national guidelines (hereinafter referred to as the Guidelines) for all role-players handling rape and other sexual offence cases.²⁷ The aim was to compile a set of guidelines which would facilitate the development of an integrated and holistic approach across government and the NGO sector to deal with these offences. The intended result of the guidelines was the development and implementation of the equivalent of a memorandum or code of good practice on multi-disciplinary case management of sexual abuse from the point of the victim's disclosure to the decision whether and how parole is to be granted. After completion and the launch of the Guidelines in September 1997, the Departments of Justice, Health, Safety and Security, Welfare and Correctional Services undertook to implement the Guidelines within their line-functions by way of internal regulatory measures. In September 1998 (a year after the launch of the Guidelines) a meeting was held by the Task Team to ascertain from the participants whether the Guidelines had been made available to all staff dealing with cases of sexual offences in the government departments represented at the meeting; whether training has been offered to the role-players and what progress has been made in the implementation of the Guidelines. The finding was disappointing as only the Department of Safety and Security had started training and had implemented internal instructions in this regard. A brief overview of the content of the Guidelines and the response of each of the Departments are given below.²⁸

2.5.9 **The Commission is of the opinion that a national strategy for multi-disciplinary intervention relating to sexual offences should be agreed upon by**

²⁷The Guidelines are applicable to adults and children alike.

²⁸See chapter 3 below.

incumbent government departments and non-governmental organisations working in the field of sexual offences, in partnership with civil society. It is suggested that this strategy should include the development of a basic framework, be it called a national multi-disciplinary protocol or memorandum of good practice,²⁹ and that this inter-sectoral binding agreement should provide the basis for provincial or regional multi-disciplinary agreements or codes of practice. In order to ensure accountability without embodying such an agreement in legislation,³⁰ it is further suggested that provision should be made in legislation for the development of such a basic framework and its purpose.

2.5.10 **National Government must ensure compliance with a national framework of this nature. All public structures responsible for formal intervention in sexual offence cases, and non-government bodies which are mandated to perform this task, must deliver services which are prompt, sensitive, effective, dependable, fully co-ordinated and integrated, and carefully designed to avoid secondary trauma. In-house regulations, codes or memoranda of good practice must reflect each role-player's commitment and accountability in this regard. Provision must be made in the budgets of all relevant government departments on national, provincial and local government level for the effective implementation and operation of the national framework. A multi-disciplinary co-ordinating committee must be established to monitor, supervise and evaluate the implementation of such a framework, on an ongoing basis.**

2.5.11 This option was followed in New South Wales in the **Children and Young Persons (Care and Protection) Act 1998**.³¹ Section 16 of this Act requires the Director-General to provide services and promote the development, adoption and evaluation of policies and procedures that accord with the objects and principles of the Act. It also specifically requires that the Director-General promote the development of procedures and protocols with government departments and agencies and the community sector and to ensure that these

²⁹The Guidelines should provide a good starting point.

³⁰Inclusion in legislation could lead to non-flexibility and rigidity which may work against the very purpose of such agreements.

³¹<http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nsw/con...s16.html>. Retrieved on 00/06/15.

procedures and protocols are implemented and regularly reviewed. Accountability and implementability are ensured in this way, without casting the procedures in stone.

2.6 Case management

2.6.1 Introduction and background

2.6.1.1 As a result of the nature of sexual crimes and the devastating effects on the victim's life, the sooner the criminal justice process (from the first report or disclosure to finalisation of the criminal court process) supports the victim the sooner the victim can piece his or her life back together. Delays in the processing of sexual offence cases may delay the onset or completion of the healing process for the victim, prolong the anxiety and trauma associated with court appearances and may erode the memory of the victim and other significant witnesses. Language development may also occur during long periods, and child victims may mature physically, emotionally and psychologically, contributing to the development of inconsistencies in the child's evidence as compared to the initial statement that may be detrimental to the case.³²

2.6.1.2 Victims of sexual offences and those persons involved with supporting these victims on a day-to-day basis are generally critical of the time delays which are inherent within the present criminal justice system. The consultative workshops conducted throughout the country indicated that currently most cases of child sexual abuse are managed poorly.

2.6.1.3 Delays do not only affect the victim. They may also have a negative impact on the alleged offender who may, after spending a long time awaiting trial in prison, lose employment and other associated necessities, only to be acquitted with no recourse to compensation. In some cases, unless bail is granted, a person may be in custody from the time he or she is arrested until the conclusion of the trial. Since such person is presumed to be innocent until proven guilty, it is therefore of critical importance to keep the period of delay prior to the trial as short as possible. Delays may also work in favour of the defence (accused person), as multiple adjournments (for a variety of reasons) requested by the defence effectively delay court proceedings. This, in turn, takes its toll on the memories of the victim and

³²See also V Bassermann 'Justice delayed is justice denied: Proposed law reform' October 1989 **Consultus** 113 - 114.

any witnesses. A number of years can easily elapse between the time a person is charged with an offence and the handing down of sentence.

2.6.1.4 Delays may be experienced during the police investigation phase, the criminal court processing phase or both. 'Inadequacies in the police investigation phase' is a handy scapegoat for unnecessary delays.³³ Investigations are hampered by a number of factors,³⁴ all making efficient policing, including processing of dockets, very difficult. The police normally commence their investigation by opening a docket (police file) when a case is reported, i.e. when a complaint is lodged. The case is allocated to the relevant department, and then to a specific investigating officer who will refer the docket to the prosecutor's office. When a suspect is arrested, the docket reaches the prosecutor within forty-eight hours, for purposes of the first court appearance of the accused.³⁵ The suspect will probably apply for bail, which application will be heard in either a district or regional court, depending on the 'classification' of the offence in terms of the Criminal Procedure Act 51 of 1977. The docket is then returned to the police contact officer attached to the court, who in turn sends it back to the police station from which it originated. The prosecutor may give directions as to further investigation needed on the docket. The docket is usually sent back and forth repeatedly while instructions are given and carried out. There is no specific time-limit for the completion of an investigation or any prosecutorial direction of the investigation, but once a month the officer in command of a police station does an inspection of all ongoing investigations. It is this officer's duty to monitor the progress of all investigations under his or her command and to promote their timely completion. Even though they do not have fixed time-limits on investigations, the police is bound by the date set for the hearing by the court. The prosecutor may request a postponement on the grounds that further investigation is necessary, but it remains in the discretion of the presiding judicial officer to grant or deny the request.³⁶

³³R van Vuuren and JH van Rooyen 'Postponements in criminal cases in Pretoria Magistrates' courts: a cost-effectiveness study' 1994 (1) **SACJ** 20 - 21.

³⁴Lack of experience of investigators, lack of legal knowledge (not a prerequisite for becoming an investigator), lack of investigators, 'third world' factors such as informal housing and the ever-changing infrastructure of such establishments, lack of willingness by the public to co-operate with the police.

³⁵Section 50(1) of the Criminal Procedure Act 51 of 1977.

³⁶Section 168 of the Criminal Procedure Act 51 of 1977.

2.6.1.5 Reasons identified as the most frequent causes of delay of court proceedings are as follows:³⁷

- postponements for further investigation;
- witnesses do not show up;
- the accused requests legal representation;
- the accused's attorney does not show up, or requests a postponement because he or she has not had enough time to prepare for the case;
- (other) postponements at the request of the defence (reasons unspecified);
- postponement in order to acquire the evidence of expert witnesses;
- the docket is lost or is not available at the trial;
- the SAP 69 form (list of previous convictions) is not available in time.

2.6.1.6 At a time when the country as a whole is being urged towards greater and improved productivity, millions of hours are squandered by delays in investigations and postponement of court proceedings. Court proceedings involve huge financial burdens, and the longer a case is dragged out, the heavier the burden becomes. Taking even the most conservative estimate of the numbers of witnesses involved in each case, and the 'wasted' hours which each spends waiting to be told that his or her evidence will not be required that day, at least two million hours are lost each year. A Cape Town economist and employment consultant is quoted³⁸ as saying, 'If these figures are translated into hard cash, we're looking at losses of anything from R25 - R50 million annually'.³⁹

2.6.1.7 The need for mechanisms to be built into the system for speedier finalisation of the court process is apparent. Bearing in mind that there are many and varied reasons for delays, many of which are unforeseen, the 'solution' to curbing delays will have to make provision for those delays which are sometimes an acceptable and necessary part of the criminal procedure process. The need to ensure that the accused in a criminal trial has a fair hearing often makes the postponement of cases inevitable.⁴⁰

³⁷Van Rooyen and Van Vuuren 1994 (1) **SACJ** 18.

³⁸The Long Wait or the Long Arm of The Law' **Personality**, 16 September 1987, p. 47.

³⁹As these figures were calculated in 1987 they would logically be much higher now.

⁴⁰See also **In re Mlambo** 1992 (2) SACR 245 (ZS) for a comparative constitutional analysis of the right of the accused to be tried within a reasonable time. See further **Barker v**

2.6.2 Submissions received

2.6.2.1 Respondents⁴¹ were unanimous in their opinion that sexual abuse cases should be expedited through the court process as far as possible. This was felt to be especially pertinent where the victim has contracted AIDS⁴² as a result of the offence or where the delay could cause unnecessary distress to the victim and affect the quality of the (child) victim's evidence.⁴³

2.6.3 Comparative analysis

2.6.3.1 The American Bar Association (ABA) is of the opinion that delay signals a failure of justice and subjects the court system to public criticism and a loss of confidence in its fairness and utility as a public institution.⁴⁴ It is also of the opinion that to enable just and

Wingo 407 US 514 (1972) for the position in the USA and **Re R and Thompson** (1983) 3 DLR (4th) 642; **R v Donald** (1983) 5 DLR (4th) 382 for the position in Canada. See also J Kovacevich 'The inherent power of the district court: Abuse of process, delay and the right to a speedy trial' May 1989 **New Zealand Law Journal** 184 at 189 et seq; Andrew L-T Choo 'Delay and abuse of process' October (1992) **LQR** 565.

⁴¹**Joint submission by the Institute for Security Studies, Nisaa Institute for Women's Development, the Pretoria Maintenance Forum and Ms Portia Mnisi; SAPS, Social Work Services, Head Office Management; Combined report by members of SAPS: Child Protection Units KwaZulu Natal; Ms Collet Wagner; Attorney-General: Transvaal.**

⁴²**Joint submission by the Institute for Security Studies, Nisaa Institute for Women's Development, the Pretoria Maintenance Forum and Ms Portia Mnisi.**

⁴³**The National Council for Persons with Physical Disabilities in South Africa; Attorney General: Transvaal.**

⁴⁴Commentary to section 2.50 - Caseflow Management and Delay Reduction: General Principle of the American Bar Association's Standards relating to Trial Courts, 1979. Section 2.50 of the ABA Standards reads as follows:

'From the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is

efficient resolution of cases, the court, and not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket. The **ABA's Standards Relating to Trial Courts**, 1979, prescribes that each court should have a program to reduce and prevent delay. Essential ingredients of such a court delay reduction program are:⁴⁵

- A strong continuing judicial commitment to delay reduction, expressed in written goals and objectives to guide court operations.
- A published case management plan detailing the delay reduction techniques, ultimate time standards and a transition program for reaching those standards where there is a backlog problem.
- A system to furnish prompt and reliable information concerning the status of cases and case processing.⁴⁶

2.6.3.2 The need for speedy resolution of trials is of particular importance to child victims. In this regard several jurisdictions have considered proposals to prevent unnecessary delays in cases where children are involved.

2.6.3.3 In New Zealand, the **Report to the Court's Consultative Committee from the Working Party on Child Witnesses**, 1996, also noted the need for vigilance to ensure that cases are not unnecessarily delayed and that requests to delay the setting of trial dates or subsequent requests for adjournment should be scrutinised closely. The report recommends that:

- All courts adopt a tracking system for cases involving child complainants. Until an electronic system is in place to identify cases where the complainant is a child, the police and the department for courts need to liaise and agree on a simple means of tracking cases so that they are readily recognisable through the court process.

essential to reducing delay and, once achieved, maintaining a current docket.'

⁴⁵Section 2.54 - Court Delay Reduction Program.

⁴⁶The ABA Standards state that such delay reduction programmes can be enhanced by Bar support and lawyer co-operation, adequate resources, utilisation of special expertise, and consideration of alternative methods of dispute resolution which should facilitate an earlier termination of actions.

- Courts accord priority to cases involving child complainants.
- A judge in each court area be allocated the responsibility to monitor the progress of cases with child complainants and take action to ensure such cases progress as quickly as possible and within agreed time frames.
- Registrars provide judges responsible for overseeing cases involving child complainants with monthly status reports on these cases to allow for pro-active case management.
- Registrars reserve forward dates for depositions and trials for cases involving child complainants and in exceptional cases consider moving existing trials to allow earlier hearing of these cases.
- Courts set deposition dates at the same time as dates for the consideration of pre-deposition matters.
- Courts set trial dates at the same time as dates for the consideration of pre-trial matters.
- Courts accord the highest priority to appeals and retrials involving child complainants.
- The Chief Justice⁴⁷ and the chief district court judge consider issuing a practice note dealing specifically with cases involving child complainants, covering the relevant issues above.

2.6.3.4 The November 1988 **Report of the Law Commission of Victoria, Australia**,⁴⁸ although conceding that time delays contributed to the trauma of child victims, also noted that all victims experienced trauma relating to time delays, and giving priority to child victim sexual abuse cases might delay the prosecution of more serious cases. The report recommends that some priority should be given, and that proceedings should commence within a 12 month period of the charge being laid.

2.6.3.5 Additionally the ACT Community Law Reform Committee⁴⁹ suggests that child sexual assault cases should be given priority in time-tabling of court matters so they are brought to trial within a prescribed time after the charges have been laid. Fast-tracking of cases means that the judge would see the child more at the age when the abuse occurred. It would also mean the evidence is fresher in the minds of all parties to the proceedings, and the whole court process would be completed much faster.

⁴⁷Now known as the President of the Supreme Court of Appeal.

⁴⁸**Report 18, Sexual Offences Against Children.**

⁴⁹**Discussion Paper 4: Sexual Assault**, para 638 - 639.

2.6.4 Evaluation and recommendation

2.6.4.1 The development of sexual offence management protocols which outline the roles, functions and responsibilities of the various role-players involved in the management (both investigation and prosecution) of sexual offences will assist to some degree in the more expeditious management of cases,⁵⁰ but will not resolve the problem entirely.⁵¹

2.6.4.2 By assigning a number of detectives (who in turn have been assigned a number of uniformed police members), to a specific prosecutor in serious sexual offence cases, an additional number of delays could be eliminated. A joint investigation team⁵² of this nature would have to be closely monitored to ensure that it keeps within agreed-upon or set time-frames. A monitoring system would have to be established to ensure compliance. The monitoring system would have to override the division between the Departments for Justice and Constitutional Development and Safety and Security.

2.6.4.3 In addition to inter-sectoral protocols and joint investigation teams, consideration should be given to the introduction of case-flow management. Case-flow management is the term used to describe court-controlled disposition of cases within given time frames. This technique is aimed at reducing delay and increasing efficiency. Case-flow management techniques are capable of being tailored to meet the needs of a particular case. This is especially important in sexual offence cases and more important in sexual offence cases involving children. By adopting case-flow management techniques the courts themselves reduce delay by supervising or managing the time and events involved in the movement of cases through the courts' system from the commencement of process to judgment. Standards and goals are set for certain specific events, such as the filing of specific pleadings, the completion of discovery, entry for trial and the trial itself. If a party does not meet the standards due to fault on his or her part, sanctions could be imposed.

2.6.4.4 The essential elements of case flow management which a trial court should use

⁵⁰For example, non-compliance with the **SAPS National Instruction 22/1998 Sexual Offences: Support to Victims and Crucial Aspects of the Investigation** results in disciplinary steps being taken against the member in question.

⁵¹See par 2.3 above.

⁵²See Chapter 4 below for a more detailed discussion on joint investigation teams.

to manage its cases are:

- Court supervision and control of the movement of all cases from the time of the filing of the first document evoking court jurisdiction through to final disposition.
- Establishment, promulgation and monitoring of time standards for the overall disposition of cases, coupled with sanctions for non-compliance.
- Procedures for early identification of cases that may be protracted, and for giving them special administrative attention where appropriate.
- Adoption of a trial listing policy which ensures efficient use of judge time while minimising adjournments caused by over-listing.
- Commencement of trials on the original date scheduled with adequate advance notice.
- A firm, consistent policy for minimising adjournments.

2.6.4.5 A large number of common law jurisdictions in Australia have time-limits in relation to the conduct of criminal proceedings.⁵³ These have been introduced to provide a discipline and an incentive in the conduct of such proceedings which are glaringly absent without them. The justification for time-limits in relation to sexual offences is a special one. Complainants in sexual cases are often particularly nervous and distressed. Even though giving evidence in non-sexual offence cases may be difficult and unpleasant, it is even more so in sexual offence cases. Consequently there is a stronger case than usual for completing the legal proceedings as quickly as possible.⁵⁴

2.6.4.6 Reduction of time spent on cases and improvement of service delivery are also at the heart of the 'e-justice' programme, which will make its debut at magistrate's courts in Johannesburg and Durban. The pilot project ran from July 2000 until March 2001.⁵⁵ The programme entails a computer system linking police, courts, correctional services and the Department of Social Development. It will enable police, prosecutors and officials to track the progress of an accused or a civil case all the way through the justice system. The project is

⁵³See also section 3161 of the US Federal Rules of Criminal Procedure.

⁵⁴Law Reform Commission of Victoria **Discussion Paper No 5: Rape and Allied Offences: Procedure and Evidence** March 1987.

⁵⁵R Brand "E-justice' set to rattle criminal cages" **IOL NEWS** http://ww.../newsview.php3?click_id=0&set_id=1&art_id=ct20000614195221228R1622 as on 15 June 2000.

aimed at eliminating bottlenecks in the criminal justice system and reducing corruption.

2.6.4.7 **The Commission recommends that a case-flow management strategy including time-frames be developed inter-sectorally and that initiatives such as the ‘e-justice’ programme be incorporated in the strategy in order to reduce delays in the criminal procedure process.**

2.6.4.8 **It is also recommended that non-compliance with such a case-flow management strategy (including time-limits) be met with sanction. To this end it is proposed that the possibility of introducing a system of costs in criminal proceedings in courts be investigated.⁵⁶ If this proposal is accepted, the presiding officer will be empowered to penalise either the State or the defence by means of an appropriate costs order for causing unjustified delays. The knowledge that such orders can be granted during the course of a trial or at its conclusion ought to have a beneficial effect on all concerned. It is not recommended that non-compliance with the case-flow management strategy and more specifically time-limits in terms of this strategy should affect the manner in which the case is heard or should result in the case being dismissed or charges withdrawn.**

2.7 **Summary of recommendations**

- It is recommended that the set of guiding principles for the management of sexual offence cases, first developed at the University of Durban-Westville Conference on Sexual Offences against Children, the Legal System and the Management of the Offender and Victim in 1994 and subsequently refined through consultation and debate, be incorporated as a substantive provision in the new Sexual Offences Act.
- Government should develop a strategy for multi-disciplinary intervention relating to sexual offences. This strategy should include the development of a national basic

⁵⁶See also Editorial ‘Expediting criminal proceedings’ October 1990 **Consultus**, p. 72; J I Welch ‘Kostebevele in strafsake’ October 1990 **Consultus**, p. 115; New Zealand Law Commission **Report 60: Costs in Criminal Cases** Wellington, May 2000. See also the Commission’s recommendation in this regard in the **Interim report on the Simplification of Criminal Procedure** (Project 73) August 1995, par. 4. 134.

framework for intervention, i.e. a national protocol on sexual offences. Provision must be made in the budgets of all relevant government departments on national, provincial and local government level for the effective implementation and operation of the national framework.

- Government must ensure compliance with a national framework of this nature. All public structures responsible for formal intervention in sexual offence cases, and non-government bodies which are mandated to perform this task, should deliver services which are prompt, sensitive, effective, dependable, fully co-ordinated and integrated, and carefully designed to avoid secondary trauma. In-house regulations, codes or memoranda of good practice must reflect each role-player's commitment and accountability in this regard.
- A multi-sectoral co-ordinating committee must be established to monitor, supervise and evaluate the implementation of such a framework, on an ongoing basis.
- Case-flow management techniques which are flexible enough to be adapted to the needs of individual sexual offence cases, but have the overall purpose of reducing delay and increasing efficiency must be introduced.
- Such case-flow management strategy, including the time-frames, must be developed inter-sectorally and initiatives such as the 'e-justice' programme should be incorporated in order to reduce delays in the criminal procedure process.
- Non-compliance with the case-flow management strategy (including time-limits) should be met with sanction. It is proposed that an investigation be undertaken to determine the viability of introducing a system of costs in criminal proceedings.
- Non-compliance with the case-flow management strategy should not affect the manner in which the case is heard or results in the case being dismissed or charges withdrawn.

CHAPTER 3

AGENCIES OR SERVICE PROVIDERS

3.1 Introduction

3.1.1 The purpose of this Chapter is to identify the agencies or service providers who are involved with or play a key role in the prosecution of a sexual offence case, including those tasked with providing services to victims of sexual offences.

3.1.2 All the agencies or service providers covered in this Chapter in some way

provide services to victims of a sexual offence, whether it be an investigative function, protection and advocacy, or support and counselling services.¹ They are not the only agencies which offer services to victims of a sexual offence and the order in which they are dealt with does not necessarily indicate the order of contact with the victim. However, these agencies have been selected because they either work exclusively in the area of sexual offences or provide a specialised service for sexual offence victims.

3.2 The South African Police Services

3.2.1 The South African Police Service (hereafter referred to as SAPS) is the gateway through which victims of crime must pass to enter the criminal justice system and as such this agency will be dealt with first. The police collect the evidence, arrest the suspect, record the statements of the victim, the accused and other witnesses, investigate the case and later forward it to the public prosecutor.

3.2.2 In terms of section 205(3) of the Constitution of the Republic of South Africa Act 106 of 1996, the objects of SAPS are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of South Africa and their property, and to uphold and enforce the law. Generally, criminal proceedings flow from the laying of a complaint, a police arrest of a suspect and a police investigation. The laws and procedures governing the rights and discretion of the police regarding arrest are found in sections 39 to 53 of the **Criminal Procedure Act** 51 of 1977. In terms of section 40 of the **Criminal Procedure Act** an arrest may be made by a peace officer without a warrant 'whom he reasonably suspects of having committed an offence referred to in Schedule 1...'. The sexual offences of rape, indecent assault and bestiality are Schedule 1 offences.

3.2.3 SAPS is regulated in terms of the South African Police Service Act 68 of 1995. In terms of section 25(1)(b) of this Act the National Police Commissioner is empowered to issue national orders and instructions which are generally necessary for the 'establishment and maintenance of uniform standards of policing at all levels required by law'. Under this authority **National Instruction, No 22 / 1998, Sexual Offences: Support to Victims and Crucial**

¹This does not necessarily apply to the Department of Correctional Services where it is safer to say that services are provided mainly for the benefit of the offender.

Aspects of the Investigation, was issued.² In addition to encompassing guidelines, the Instruction ensures that disciplinary steps will be taken against any member of SAPS who disregards any portion of the Instruction. The Instruction states clearly that it may only be deviated from in the case where a compelling reason exists in a specific instance.³ The Instruction includes basic rules of professional assistance such as giving immediate attention, treating victims and their families with respect and courtesy, protecting the privacy and dignity of the victim, taking professional statements, providing victims with regular information, informing victims of the procedures followed by SAPS and the criminal justice system and referral to medical, counselling and support services.⁴

3.2.4 The Instruction provides a detailed, step-by-step guide on how to deal with the investigation. As a result of problems experienced with regard to strict adherence to jurisdictions, the Instruction provides that irrespective of where the crime was committed, the case must be dealt with as if it had occurred in the relevant area of jurisdiction. This includes the medical examination and the taking of the preliminary statement. Only thereafter is the docket forwarded to the appropriate station (with the proper jurisdiction). To ensure professional service, only investigating officers designated to deal with sexual offence victims may do so. Steps and the manner in which to interview a victim are included as well as a provision that even though a statement is needed to open a case docket, only a skeleton or brief statement will be taken at the moment of reporting. Extensive guidance is given on how to safeguard the crime scene and to preserve evidence. The medical examination of the victim and the suspect is awarded ample coverage and includes specific guidelines on the nature of the investigating officer's responsibilities, the object of the examination, which samples need to be taken, how to keep the victim informed and what to do with minors and mentally ill persons. Medical and counselling services and the safety of victims of sexual offences are dealt with under the heading "victim after-care". The investigating officer is also responsible for preparing the victim for court proceedings, which includes in camera proceedings, taking an impact or pre-trial statement, pre-trial consultation between the prosecutor, investigating officer, victim and key witnesses and the completion of the SAP 62 form which is used by the Parole Board when assessing parole candidates. The Instruction is accompanied by three annexures which list and explain possible samples to be taken from the victim and from the suspect and

²The Instruction was officially distributed by SAPS in November 1998.

³National Instruction, No 22/1988, section 1.

⁴National Instruction, No 22/1988, section 3.

a checklist which could be used to ensure that a statement contains the necessary detail.

3.2.5 **Aspects of the National Instruction: Sexual Offences: Support to Victims and Crucial Aspects of the Investigation**

3.2.5.1 In order to establish the responsibilities of a member of SAPS with regard to the investigation of sexual offences it is necessary to revisit certain aspects of the Instruction.

3.2.5.2 The Instruction limits the discretion of a member of SAPS regarding the acceptance of a report of a sexual offence. The Instruction clearly states that '(n)o victim may be turned away'.⁵ There is nothing in the Instruction empowering a SAPS member to screen or select cases in which SAPS will proceed with an investigation. The only discretion that a SAPS member does have in relation to the continuing investigation of the sexual offence is the arrest of the suspect, which, as mentioned above, is regulated by section 40 of the Criminal Procedure Act 51 of 1977. To emphasise, a SAPS member is not entitled to make any decisions as to whether to accept a complaint of a sexual offence or not.

3.2.5.3 However, in practice SAPS members do exercise substantial discretion on whether to accept a charge of a sexual offence, whether to proceed with an investigation and whether to refer the case to the prosecuting authorities for a decision on whether to prosecute or not. They exercise this discretion almost invisibly.⁶

The combination of the house-to-house survey data and the CMIC data reveal an alarming point of non-accountability in the information system: a rape victim can go to the police station, tell the police on duty what had happened to her, but not always enter the crime management information system as a case of sexual violence. A large proportion of sexual violence cases (15/16) are filtered out at the point of registration at the police station, possibly because these are judged to stand little chance of making it through the legal system. By best estimates in 1997, for every 394 women raped, 272 go to the police, only 17 become "cases", of which five get referred to the court by the police and only one perpetrator gets convicted. This gives the average rapist in South (Metropolitan Johannesburg) area roughly the same chance of conviction as he has

⁵National Instruction, No 22/1998, section 3(1).

⁶The latest 1998 statistics for rape show that of the 49 280 rapes reported to the police, only 22 189 were referred to court for a decision to prosecute. See further Anderson et al 'How to Police Sexual Violence' **Crime and Conflict** No 15, Autumn, 1999.

birthdays in a full year.⁷

3.2.5.4 A SAPS member decides whether a case is founded or unfounded and whether and how to investigate - decisions which affect the quality of evidence available for trial. The discretion to decide that a report is 'unfounded' is wide and may vary from reasons such as that the victim is not believed or regarded as credible, or reluctance to pass on what are perceived to be 'real' cases that will not stand up at subsequent stages in the criminal justice process (such as cases involving absence of physical injury), to victims themselves not wanting to pursue the case.⁸ Admittedly members of SAPS are from time to time confronted with false allegations. Still, members of SAPS may legally not decide whether or not to accept such complaints. Their perceptions of what a false allegation is may be clouded by their own subjective interpretation of events or prejudices and may deny victims justice. All SAPS members are obliged to accept the reports and to forward these to the public prosecutor.

3.2.5.5 SAPS is obliged to prepare the victim of a sexual offence for court proceedings.⁹ The investigating officer must take the victim to the court where the case will be heard prior to the day of the trial. The investigating officer must determine who the specific prosecutor allocated to the case is¹⁰ and arrange for a pre-trial consultation between the prosecutor, the investigating officer, the prosecutor and key witnesses. However, there is nothing contained in the Instruction facilitating contact, information sharing, and collection of evidence for the trial between the investigating officer and the prosecuting authority prior to the advent of the trial. As the investigation of the sexual offence is the sole responsibility of the investigating officer, he or she is under no obligation to consult with any other criminal justice agency or non governmental structure in the course of the investigation.

⁷CIETafrica **Prevention of Sexual Violence: A Social Audit of the Role of the Police in the Jurisdiction of Johannesburg's Southern Metropolitan Local Council**, Johannesburg, October 1988, p. iv.

⁸Stanton, Lochrenberg and Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 17.

⁹National Instruction, No 22/1998, section 13.

¹⁰Even though section 13(4)(b) of the National Instruction, No 22/1998, creates the impression that the investigating officer is in a position to arrange for a specific prosecutor to be allocated to the case, it is clearly for the control prosecutor to decide who will be assigned to the particular case.

3.2.5.6 It is also the responsibility of SAPS to investigate the sexual offence. This entails the collection of evidence in the form of a statement from the victim and any other witnesses, arranging for forensic exhibits to be taken and any other information which may be of assistance in the securing of a conviction.¹¹ The Instruction contains detailed guidelines on how to achieve these objectives. Of importance here are the following: The investigation of a sexual offence case must be conducted by an investigating officer;¹² a skeleton docket must be opened if the victim is unable to make a coherent statement;¹³ the responsibilities of the first police member on the scene of the crime, including the obtaining of a brief description of what happened to the victim (take notes, not a statement) are described;¹⁴ and the recommendation is made that the investigating officer initially only obtains a brief description in private of what happened from the victim (this is not a statement)¹⁵ and that the in-depth statement should only be taken from the victim as soon as she or he has recuperated sufficiently (depending on the circumstances, but ideally within 24 - 36 hours).¹⁶ The manner in which the investigation is conducted largely determines whether the case will be prosecuted and the quality of evidence that will be presented in court.

3.2.5.7 In terms of section 10 of the Instruction, the investigating officer has the responsibility of taking or having the victim's in-depth statement taken once the victim has recuperated sufficiently. Although there is no provision in the Instruction for the victim to write her or his own statement or to be assisted by a third party to do so, there is nothing in law to prevent a victim from doing so.

3.2.5.8 Understandably information on the nature of evidence required in order to secure a conviction for the various sexual offences is omitted from the Instruction.¹⁷

3.2.6 **The National Instruction in practice**

¹¹See paragraph 3.3.2.7 below for a brief discussion on the use of crime kits.

¹²National Instruction, No 22/1998, section 4(4)(a).

¹³National Instruction, No 22/1998, section 4(3).

¹⁴National Instruction, No 22/1998, section 5(3)(b)(ii).

¹⁵National Instruction, No 22/1998, section 6(1).

¹⁶Ibid.

¹⁷Offenders and potential offenders would in effect be given a checklist of which evidence should be destroyed so as to further hamper any investigation.

3.2.6.1 Although the National Instruction for the investigation of sexual offences was officially distributed in 1998, very few members of SAPS comply with or seem to be aware of its existence. In practice, the first officer at the scene of a rape or the officer on duty at the charge office where the rape is reported takes a sworn statement from the victim before the investigating officer is informed of a rape report. These officers are not in any way skilled or specialised in sexual offences, or even more broadly trained in the taking of statements.¹⁸ It is this statement that forms the basis of the case and upon which the police will exercise their discretion on whether to proceed with the investigation or not. It is also often on the basis of this statement that the prosecutor will decide whether to prosecute the case or not.

3.2.6.2 Female victims are mostly not given the choice as to whether they would prefer to speak to a female officer (charge office officer or investigating officer). The Instruction states that police members are to take such statements in privacy, away from the main charge office and where possible, by a female member. However, where a female member is not available and in order to prevent unmonitored questioning, it might be advisable that with the consent of the victim, a support person be present during the taking of the statement. Obviously where such support person himself or herself is a material witness alternative arrangements will have to be made.

3.2.6.3 It is very seldom that the victim's sworn statement is taken at a later stage as indicated in the Instruction and seldom that supplementary statements are taken should the victim have additional information. There is little, if any, contact between the victim and the investigating officer in the time period between the laying of the charge and the trial, and it is extremely rare that the investigating officer participates in setting up a consultation meeting between the victim and the prosecutor.¹⁹

¹⁸Less than 10% of detectives are trained as detectives. As part of their basic training, uniformed SAPS members on patrol are now instructed, if they are the first to arrive at a scene where a sexual offence has been committed, only to make the victim safe, to secure the scene of the crime, to get a basic description of the perpetrator and to call the designated investigating officer. Detective officers who have been trained to investigate sexual offence cases will then conduct any questioning of the victim and take the case further.

¹⁹Ms B Pithey, member of the Sexual Offence Project Committee, personal experience.

3.2.6.4 Another factor which can play a role in sexual violence victims' experiences of the police is language. In multicultural societies language barriers often disadvantage complainants when dealing with the criminal justice system. Complainants do not have statutory rights to have access to professional interpreters which means that the victims verbal account of the incident may not be accurately reflected in the statement.

3.2.6.5 As stated in the Instruction, SAPS is also responsible for ensuring that a victim of a sexual offence is examined by a district surgeon. Where officials fail to do so timeously evidence is lost which can never be regained. This failure may be due to the non-availability of a district surgeon or non-compliance with the instructions.

3.2.6.6 The training of police officials and promise of more training are heartening. However training will not necessarily change attitudes and the manner in which victims are treated. Unwritten rules still exist whereby reaction and investigation times are delayed 'in case' the victim wishes to withdraw the charge. In stations where these rules exist victims are told to return in a week when a statement will be taken and the investigation started.

3.2.6.7 Very alarming is the fact that some SAPS officials themselves commit crimes of a sexual nature. In these circumstances the most vulnerable victims are the members of such a police official's own family.²⁰ Allegations abound of sexual offences perpetrated against persons detained in police holding cells. Reports have also been made by victims of sexual offences that upon reporting they have been further sexually assaulted by a police member - the very person to whom the victim turns for help.²¹

3.2.7 **Other sexual offence related initiatives within SAPS**

²⁰An article in the **Mail and Guardian** dated 12 February 1999 reports the rape of a 3 year old girl by her policeman father. See also www.mg.co.za/mg/news/96Feb/9Feb-molest.html where it is reported that a senior official in the Safety and Security Secretariat has been charged with child molestation.

²¹See for instance the October 1998 CIETafrica report on the prevention of sexual violence, p. 21: 'Two police respondents reported a disturbing form of (police) corruption: they referred to occasions when police had sex with a victim to "check if she was raped" or as a form of "payment" for doing a full investigation. Four professional nurses and one social worker also listed this form of corruption'.

3.2.7.1 In the spirit of transformation SAPS has prioritised crimes against women and children²² and various initiatives have been launched within SAPS to make this commitment a reality.

3.2.7.2 SAPS has embarked on the RDP Victim Support Programme. The scope of the programme includes:

- ° Training of police officials in the appropriate and skilful handling of all victims of crime / violence;
- ° Creation of more user-friendly police stations;
- ° Referral of victims to support services in the community;
- ° Closer co-operation with other government departments, non-governmental organisations and community based organisations to co-ordinate service delivery to victims of crime / violence.

3.2.7.3 SAPS officially commenced with accredited training in investigative techniques relating to sexual offences in February 1995. The Sexual Offences Investigative Techniques Course includes training on domestic violence and sexual offences. Specialised individuals, relevant state department officials and relevantly qualified officials within the Service are commissioned to train police officials during this course. Training sessions are held on an ongoing basis for detectives specialising in sexual offence cases. All officials involved in investigating sexual offence cases also receive in-depth training in forensic skills, the importance of the medical examination by the district surgeon and the preservation of evidence obtained for forensic testing. The content of the course has recently come under the spotlight and is being re-developed.

3.2.7.3 Of concern is the fact that even though the material might be adequate, many police officials undergoing training may not be suitable candidates for work in this field. Dealing with crimes of a sexual nature can be emotionally draining and necessitates sound interpersonal and communication skills. Not all police members or all people for that matter can be expected to possess the personal skills required to deal with such crimes on a continuous basis. Although training is receiving priority attention, there is an urgent need for proper

²²SAPS - Policing Priorities and Objectives 1998/1999. See www.saps.co.za/17_policy/priority/foreword.htm downloaded on 30 March 1999.

selection of suitable persons to be trained.

3.2.7.4 In addition to the above-mentioned specialised training, promotion exams, which must be passed before a police member can move to a higher rank, also include materials on dealing with sexual offences. Basic training for all SAPS recruits has also been re-designed to include a new emphasis on human rights and victim support.

3.2.7.5 Police stations are often viewed as not being consumer friendly. One-stop care facilities have been established in some areas to provide a professional service by all crisis intervention role-players in one building. These role players are SAPS, district surgeons and counselling services. Close interaction between the various disciplines is proving to be essential to the success of these centres.

3.2.7.6 The Provincial SAPS Commissioners are responsible for determining, in conjunction with local communities, where such facilities should be set up. Communities have in some instances proactively established such one stop centres by themselves. Although one stop centres are in their infancy, it would appear that where such centres have been located in a hospital or attached to a police station, they are far more sustainable and accessible than centres which are privately funded and located separately. Where such centres have been established in urban areas, they have proved to be inaccessible to rural victims and *vice versa*.

3.2.7.7 In an attempt to create victim-friendly police stations, the Victim Empowerment Programme within the SAPS has started introducing comfort rooms which will, in the absence of one-stop centres, enable victims of sexual offences to have their statements taken away from the charge office counter and in private. This concept entails putting the victim at ease by, for example, offering a cup of coffee or tea, in comfortable surroundings, and, most importantly, in private in a separate room.

3.2.7.8 A further initiative by the SAPS is the provision of a victim care package containing essential toiletries and items, such as disposable panties, for victims of sexual offences. The provision of underwear is crucial as a victim of a sexual offence is required to let his or her panties or underpants be taken for forensic testing. Funds have recently been allocated for the permanent implementation of the project.²³

²³Snr Supt Pretorius, National Coordinator, SAPS Victim Support Programme.

3.2.7.9 To ease a victim's path through the potential maze of bureaucracy and the resultant re-victimisation which that entails, a resource directory of service providers was seen as a solution. The SAPS Victim Empowerment Programme envisaged that the community police fora attached to police stations would undertake to liaise with service providers in their area. A list of the local service providers would then be made available in the charge office and at scenes of crimes to all victims of crime. The Gauteng Metropolitan Council has funded and distributed such a directory for the Greater Pretoria Area. A similar directory is in use in the Western Cape and Kwa Zulu Natal.

3.2.8 **Specialised police units**

3.2.8.1 The first specialised police unit dealing solely with crimes against children in South Africa was established in 1986. Today there are 27 child protection units (CPUs) nationally and a further 156 SAPS members who are specialised in policing crimes against children. CPUs focus solely on preventing and combatting crimes against children.²⁴

3.2.8.2 The concept of a specialised police unit for sexual offences and domestic violence crimes has recently been expanded with the establishment of the Family Violence, Child Protection and Sexual Offences Units (FCS). The objective is, where possible, to transform all CPUs into FCS units, depending on available resources and the occurrence of crimes policed by the FCS units. Each FCS unit will be divided into three components, namely, Family Violence, Child Protection and Sexual Offences. It is envisaged that the Family Violence component will focus on the policing of the intra familiar crimes of assault with the intention to do grievous bodily harm, and attempted murder, where the victims are 18 years and older; the Child Protection component will focus on the policing of crimes committed against children,²⁵ and the Sexual Offences component will focus on the policing of sexual crimes against adults. In smaller centra where it is not viable to establish these components, the functions will be performed at station level by (a) specialised individual(s). There are currently 15 FCS units situated in metropolitan centres across South Africa. SAPS is aiming at establishing at least one FCS unit in each of the 42 police areas in the country.

²⁴For the purposes of CPU activities a person is regarded a child if she or he is younger than 18 years of age.

²⁵Although crimes committed by children are excluded.

3.2.8.3 Some of the main difficulties that are experienced in these specialised units is that they are severely understaffed because of budget restraints and that their work is not taken seriously. Members staffing these units are often stretched physically and emotionally to and beyond the limit. Many members become severely demoralised and request transfers. Some SAPS members view these units as being 'soft' units, and as units tasked with doing women's work.

3.2.8.4 In an attempt to ensure that members are suited to working in an FCS unit all applicants are now required to undergo psychometric testing before being considered for appointment. Once they have been selected they still need to undergo a further six months probation before being permanently appointed in the unit. According to Superintendent Pienaar, the National Head of the FCS, members of the FCS units are obliged to undergo comprehensive debriefing or counselling at least twice a year. This provision will go a long way to ensuring the mental health of any member assigned to such a unit and is commendable.

3.2.8.5 The FCS units profess to operate in multi-disciplinary teams, including relevant social welfare organisations and health practitioners, although there is no formal duty to do so. In addition there is no formal protocol for these units to investigate cases in consultation and collaboration with the prosecuting authorities.

3.2.8.6 The Issue Paper posed the question as to whether a specialised police unit for the management of child sexual abuse (such as the CPU) should continue to exist. All the respondents were in favour of the retention of a specialised police unit within the framework of a multi-disciplinary team.²⁶ The opinion was held that police members should be obliged to

²⁶**Dr Renee Potgieter and Associates**, RP Clinic, Pretoria; **Ms W L Clark**, Senior Public Prosecutor, Verulam; **Department of Education**; **Ms Madonsela**, Department of Justice; **Mr P Nel**, Prosecutor, Port Elizabeth; **Mr M Kekana**, Department of Public Safety and Security, Gauteng Provincial Department; **Dr JM Loffell**, Social Work Consultant, Johannesburg Child Welfare Society; **Mr E Ngwenya**, Department of Health and Welfare, Mpumalanga Province; **National Council of Women of South Africa**; **Dr J Beenhakker**, National Adviser Child and Family, National Council of Women of South Africa; **SAPS Social Work Services**, Head Office Management; **Supt N Nilsson and Insp G Riedeman**, SAPS Youth Desk, Western Cape; Combined report by members of the **SAPS: Child Protection Units, Kwazulu Natal**; **Ms Lerato Soato**, Bloemfontein Child Welfare Society; **Ms Hannie**

receive special training²⁷ on the issue of child sexual abuse and that training should preferably be competency based (outcome based training) as theoretical training offers little guarantee that the theory will be applied effectively in practice.²⁸ All respondents were also in agreement that specialised screening, selection, training and debriefing of police officials are essential to the effective functioning of such a specialised unit. Numerous suggestions for the improvement of such units were made. Some of these suggestions are: the need for the expansion of these units,²⁹ that they should be given powers to monitor court proceedings and to assist the victims in appeals if the perpetrator is acquitted,³⁰ that the CPU should employ social workers who are on duty 24 hours a day in order to enable them to deal with the issue immediately and that police officers do not have to drive around with children who have been removed,³¹ that the service be decentralised and that more resources are to be put in place,³² that the CPU should only investigate sensitive child abuse cases and that more detectives on local level be trained to deal with common and less serious cases,³³ and that personnel specialising in the policing of sexual offences against children should be compensated in accordance with their specialisation.³⁴

3.2.8.7 The creation of specialised units is an approach that has, in particular, been

Reyneke, Vryheid Child and Family Welfare Society; **Mrs A Dreyer, H Coertze and Ms I Swart**, S A National Council for Child and Family Welfare; **Ms Collet Wagner**, Chief Social Officer; **Association for Persons with Physical Disabilities, Northern Cape**; **Ms K Buys**, social worker, Nederduitse Gereformeerde Kerk in Afrika - Oranje Vrystaat.

²⁷**Adv Lekoeneha**, Free State Provincial Government; **Dr Renee Potgieter and Associates**, RP Clinic, Pretoria; **SAPS Social Work Services**, Head Office Management.

²⁸**Dr Renee Potgieter and Associates**, RP Clinic, Pretoria.

²⁹**Dr J Beenhakker**, National Adviser Child and Family, National Council of Women of South Africa; **Mr E Ngwenya**, Department of Health and Welfare, Mpumalanga Province; **Dr JM Loffell**, Social Work Consultant, Johannesburg Child Welfare Society.

³⁰**Ms Madonsela**, Department of Justice.

³¹**Association for the Physically Disabled, Eastern Cape**.

³²**Mr M Kekana**, Department of Public Safety and Security, Gauteng Provincial Government.

³³**Sup N Nilsson and Insp G Riedeman**, SAPS Youth Desk, Western Cape.

³⁴**National Council of Women of South Africa**.

introduced within policing agencies in the United States of America and Britain.³⁵ The New York Police Department programme is one such example, and includes a Sex Crimes Analysis Unit with some particularly innovative aspects, such as being staffed entirely by female police officers and maintaining a twenty-four hour hotline service. Victims are encouraged to call at any time, report crimes (remaining anonymous if they wish), receive advice about the criminal justice system and be directed to medical, counselling and legal follow-up. The other aspect of this programme is the existence of a detective office in each of the New York City's boroughs which specialises only in the investigation of cases of sexual violence. These offices, originally called Sex Crimes Investigation Squads and later renamed Special Victims Squads, handle sexual offence cases and child abuse. After the initial report of the assault, these detectives are responsible for every step of the investigation.

3.2.8.8 Between 1984 and 1991, five police forces in Scotland similarly set up specialist units for the investigation of sexual offences, while one force, throughout its police stations, deployed specialist officers who, in addition to other duties, assist in sexual offence investigations.³⁶ Officers are seconded to these units for a specified two to three year period. All the specialist officers are plain-clothed females. A specialist officer is responsible for taking statements, for accompanying victims throughout police procedures and for acting as a contact point thereafter. Some of these units have adjoining fully-equipped medical examination facilities.

3.2.8.9 Another innovative example, which was introduced in Brazil during the 1980's, is the women's *delegacias*. These police stations are staffed entirely by women and dedicated solely to crimes of violence against women, especially homicide. The women's *delegacias* were designed to encourage women to report gender-specific crimes, to provide sensitive investigations and medical examinations, and psychological and legal counselling.³⁷

³⁵The comparative analysis is based largely on Stanton, Lochrenberg and Mukasa **Improved Justice for Survivors of Sexual Violence?**, para 2.4.2 and 2.5.2.

³⁶See also M Burman and S Lloyd **Police Specialist Units for the Investigation of Crimes against Women and Children in Scotland** Edinburgh: Scottish Office Central Research Unit Paper 1993.

³⁷See also C Thomas 'In search of solutions: Women's police stations in Brazil' in M Davies (ed) **Women and Violence** London: Zed Books 1994, p. 32 - 42.

3.2.8.10 Fishwick³⁸ reports that, in Australia and Britain, the police have in general been resistant to recommendations for the introduction of specialist police squads to deal with sexual offences. It is felt that the overall inadequacy of resources and numbers of personnel, especially in rural areas, means that such reforms are impractical. The deployment of resources and training away from generalist police work may mean that a victim's initial contact is with an officer who has not received adequate training. Such police units may also be estranged from other police work, resulting in such work being marginalised.

3.2.8.11 The success of such units where they have been introduced, has been reported to be mixed. Some of the main difficulties that such units have experienced is that they are severely understaffed because of budget restraints and that their work is not taken seriously.³⁹ This also seems to hold true for South Africa.

3.2.8.12 A study within SAPS indicated that the CPU/FCS units urgently need the services of full-time police social workers.⁴⁰ Investigation of cases are being hampered by the fact that external social workers are not readily available after hours when reports of child abuse are received. Another gap identified in the system was that in many instances investigators are unable to determine whether a child had been abused and if so who the alleged perpetrator was. Social Work Services within SAPS address the first need by endeavouring to liaise with social workers outside SAPS to facilitate co-operation between them and the CPU/FCS units. In order to meet the second need, a small number of social workers, employed by SAPS, have completed forensic social work courses enabling them to assess child victims of sexual crimes by means of assessment techniques and analyses. These social workers assess children who

³⁸'Sexual assault and criminal justice: A comparative perspective on legislation, policing and research' in M Findlay and S Hogg (eds) **Understanding Crime and Criminal Justice** Sydney: The Law Book Company Ltd 1988.

³⁹C Thomas 'In search of solutions: Women's police stations in Brazil' in M Davies (ed) **Women and Violence** London: Zed Books 1994, p. 32 - 42; M Burman and S Lloyd **Police Specialist Units for the Investigation of Crimes against Women and Children in Scotland** Scottish Office Central Research Unit Paper Edinburgh 1993.

⁴⁰E Stutterheim, National Director of Social Work Services of SAPS, 'The Forensic Social Work Service of the SAPS'.

have been referred to them by the CPU/FCS unit.⁴¹ The children are referred without the social worker being briefed as to the nature of the alleged crime committed against the child. The forensic social worker compiles an objective report which is added to the docket, after interviewing the child, the alleged perpetrator, school teachers and any other person who may shed light on the incident. The child is also observed in his or her home. Where necessary the social worker is available to act as an expert witness in court. The therapeutic services needed by the child are left to the community.⁴²

3.2.8.13 Due to uncertainties regarding their role in the investigation of child abuse cases and the small number of trained forensic social workers, they are not routinely given referrals from CPU/FCS units and are seldom called as expert witnesses. From interviews held with SAPS forensic social workers the opinion is held that the services they can offer to victims of child sexual abuse could prove invaluable and that the court would receive appreciable assistance from appropriately trained forensic social workers regarding their professional assessment of the child. The report of the forensic social worker may also be a factor on which the prosecutor bases his or her decision on whether to prosecute or not.

3.2.9 Recommendations

3.2.9.1 SAPS is usually the first contact with the criminal justice system for the victim. If this initial contact does not provide the service that the victim requires, the matter often stops at this point as the victim feels or believes that there is no further recourse or access to the system.

3.2.9.2 With regard to SAPS, the following recommendations are therefore made:

- **SAPS National Instruction No 22 / 1988 Sexual Offences: Support to Victims and Crucial Aspects of the Investigation should be revisited, amended if necessary, and brought to the attention of all police officers. Aspects that should receive attention include the fact that police members do not have a discretion in accepting a charge of sexual assault; that no sworn statement should be taken**

⁴¹Many child victims do not have the financial means to pay for assessments by professional social workers in the private sector.

⁴²See also paragraph 3.6 below for a discussion of the role of NGO's in this regard.

immediately from the victim; that the case must immediately be allocated to a specially trained investigating officer from a FCS unit who has the responsibility of explaining the various procedures to the victim and must ensure that the medical examination is completed; that the investigating officer must keep the victim informed of all developments regarding the case; etc.

- More sophisticated and appropriate, obligatory mechanisms relating to the screening, selection, training and debriefing of SAPS members serving in or wanting to serve in specialised units dealing with sexual offences must be established. In addition to having received training on how to deal with a victim of a sexual offence, all inexperienced police members should receive ‘on-the-job’ training by being assigned to an experienced colleague for a set period of time.
- A culture enforcing the need for regular debriefing in the SAPS must be encouraged. Police members should have the freedom of electing whether to be debriefed by professionals either retained in-house or externally, but not from within their own unit.
- The specialised investigation of sexual offence cases must be enhanced by the obligatory facilitation of contact, information sharing, and collection of evidence for the purposes of trial between the investigating officer and the prosecuting authority prior to the advent of the trial.⁴³
- The role of SAPS forensic social workers must be clarified and formalised as a matter of urgency.

3.3 Medico-legal Services

3.3.1 Introduction

3.3.1.1 Sexual assault victims often undergo a medical examination⁴⁴ after the assault. Depending *inter alia* upon the severity of their physical injuries, a victim may, for instance, be examined by the district surgeon, a medical practitioner in private practice, a forensic nurse, or by the medical practitioner on duty at the casualty ward of a hospital. Obviously, the skill of these medical practitioners in examining victims of sexual assault and in collecting the

⁴³The concept of a joint investigating team is discussed in Chapter 4 below.

⁴⁴Both forensic and non-forensic crisis examinations.

necessary forensic evidence varies considerably. The roles of the different medical practitioners form the subject matter of this section.

3.3.1.2 Medico-legal examinations of victims of sexual assault are invasive in nature and victims often perceive such examinations as a second assault.⁴⁵ It is therefore necessary to train and sensitise medical practitioners to prevent secondary victimisation. It is also important that the medico-legal evidence collected by such medical practitioner be presented in court.⁴⁶ This section will also give attention to these aspects.

3.3.1.3 However, it is not only the victim that is often subjected to a medical examination - suspects and alleged offenders often also undergo medical examinations in the police search for forensic evidence. This is specifically provided for in section 37(2)(a) of the Criminal Procedure Act 51 of 1977 which states that 'any medical officer ... or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person ... has any mark, characteristic or distinguishing feature or shows any condition or appearance'. Section 225 of the Criminal Procedure Act 51 of 1977 is also relevant in this regard. It provides *inter alia* for the admissibility of evidence of bodily marks, characteristics, distinguishing features or the condition or physical appearance of the accused whenever the existence of such marks, features, etc is relevant. Section 222(2) of the same Act provides that such evidence will not be inadmissible solely because it was produced contrary to the provisions of section 37 or against the wish or will of the accused. In this context it is worth stating that the forensic evidence gathered from suspects and accused persons often link the perpetrator conclusively to the crime scene.

⁴⁵Both the psychological experience of discussing the assault in detail, the physical experience of the examination and the lack of provision of further treatment for, or information on, the possible physical or emotional consequences, provide opportunity for further traumatisation. However, some studies indicate that women are generally positive about the manner in which medical personnel made inquiries about their injuries. See, for instance, Bollen, Artz, Vetten and Louw **Violence against women in metropolitan South Africa**, p. 52: '[Wome] felt they were believed when they described the abuse. The majority (86, 5%) were given some advice from doctors or nurses about how to deal with the problem. Almost all women (91%) were satisfied with their treatment'.

⁴⁶On the role of medical practitioners as expert witnesses, see Chapter 33 below.

3.3.2 District surgeons⁴⁷

3.3.2.1 Forensic medical evidence is regarded as crucial for the successful prosecution of a sexual offence case.⁴⁸ Often, it is the only corroborating factor to the testimony of a victim. This medical evidence, however, is only of value if the examination is properly conducted and all the specimens for forensic analysis are collected. Frequently, such evidence is badly taken or incomplete. Another criticism that has been raised around the medical examination is the lengthy delays that occur before victims are examined.⁴⁹

3.3.2.2 Victims can either be attended to by a private practitioner or by a government district surgeon. Although honourable exceptions exist, the reputation of district surgeons, among women's organisations and other service providers is 'horrendous'.⁵⁰ The Department of Health is responsible for employing full-and part-time district surgeons, amongst whose duties are the examination of victims who have lodged complaints of a sexual nature with the police.⁵¹ District surgeons are therefore employed by the state *inter alia* to examine victims and persons accused or suspected of sexual offences and to collect any forensic evidence.

⁴⁷Recently referred to as a 'district medical officer'.

⁴⁸In this section the blanket reference to sexual offences should be understood to exclude those offences which do not require a medical examination, such as fondling for example.

⁴⁹Medical personnel, however, cannot be held responsible for the majority of these delays: Only 11% of women in the Bollen, Artz, Vetten and Louw study on **Violence against women in metropolitan South Africa** (ISS Monograph Series No 41, September 1999), p. 51 said the hold-up was due to a delay in the doctor's arrival or the doctor not being available. The majority of the women (53%) were treated more than an hour after the incident occurred due to (a) a lack of transport or a delay in transport (29%); (b) some women were alone and had no means of reaching a doctor (11%); (c) some were prevented by the abuser from reaching medical help within an hour (14%); (d) nearly 20% of women did not believe getting medical help was crucial at the time of the incident; and (e) a further 14% indicated that the shock of the experience prevented them from seeking help.

⁵⁰Human Rights Watch / Africa **Violence against Women in South Africa**, p. 97.

⁵¹District surgeons are also responsible for autopsies, drunk driving tests, carrying out abortions for victims of rape and medical treatment of prisoners, state disability pensioners, orphans, and residents of old age homes and juvenile institutions.

3.3.2.3 A district surgeon is only responsible for gathering medical evidence to confirm the sexual offence (this includes the collection of evidence and specimens from suspects or the alleged offender), and is not tasked with providing any medical treatment, for example treating an open wound.⁵² Of concern is that in many cases the district surgeon will be the only doctor that a victim of a sexual offence will ever see.⁵³ The trauma of having to see another medical professional, explain what has happened and perhaps be subjected to yet another examination could be avoided if the district surgeon were authorised to treat the victim. Currently/at present even if the victim needs medical treatment it will not be given without the victim being referred to another medical doctor or facility. An anomaly is that should the alleged offender be in custody and in need of medical care, that alleged offender will be treated at state expense.

3.3.2.4 **It is recommended that all appropriately trained medical personnel,⁵⁴ in the first consultation, conduct a proper medical examination of and treat or refer the victim of sexual violence for specialised treatment or counselling, where appropriate. It is further recommended that these medical personnel link up with the investigating team to share information on the crime scene, the evidence collected or to be collected from both the victim and or the alleged offender, the injuries sustained during the attack, to advise the investigating team on what other possible evidence could be collected, etc.**

3.3.2.5 Medical examinations may be conducted either at the consulting rooms of the district surgeon or at a provincial hospital. If a pregnancy follows a rape, the district surgeon or other medical practitioner is required to issue a certificate confirming that the pregnancy is most likely the result of the rape.⁵⁵

3.3.2.6 Although it is the responsibility of the SAPS investigating officer to ensure that the proper form (the J 88)⁵⁶ is available for completion by the medical practitioner, that all the

⁵²Human Rights Watch / Africa **Violence against Women in South Africa**, p. 96.

⁵³**Violence Against Women in South Africa**, p. 97.

⁵⁴As will become evident later in this section we do not recommend that doctors be the only persons to conduct medico-legal examinations. See paragraph 3.3.2.25 below.

⁵⁵In terms of the Choice on Termination of Pregnancy Act 92 of 1996 a woman no longer needs consent from the state to procure an abortion though.

⁵⁶The Commission is pleased to note that as a result of interdepartmental cooperation the J88 form has been appropriately amended and updated and that the new forms are in use

necessary samples are taken, and that the samples are clearly marked and forwarded to the SAPS Forensic Science Laboratory without delay,⁵⁷ the medical practitioner still collects the forensic evidence. Once all the necessary samples are taken, they must be clearly marked and forwarded to the SAPS Forensic Science Laboratory. The Police Forensic Science Laboratory attests to the fact that often samples which are collected by examiners are not collected properly and therefore are useless, with the result that vital evidence is irretrievably lost. The manner in which samples, once collected, are dealt with is of equal importance. Proper interaction between the investigating officer and the medical practitioner is therefore crucial.

3.3.2.7 In order to facilitate the collection of possible samples to be taken from a victim and alleged offenders during the medical examination, SAPS uses specific crime kits. It is the responsibility of the investigating officer to ensure that such crime kits are available at the medical examination. The use of standardised evidence collection kits by the police agencies of other countries is fairly common.

3.3.2.8 In Illinois, section 4 of the **Sexual Assault Survivors Emergency Treatment Act** (410 ILCS 70/1) provides that the Illinois State Police must administer a programme to train hospitals and hospital personnel participating in the sexual assault evidence collection program in the correct use and application of the sexual assault evidence collection kits, also known as 'S.P.E.C.K.'. The Act further provides that the Illinois Department of Public Health must co-operate with the Illinois State Police in this program as it pertains to medical aspects of the evidence collection.

3.3.2.9 **There seems to be considerable merit in formalising the relationship between the police and the health services responsible for the collection of the medical evidence. This can ensure greater accountability and clear lines of responsibility for *inter alia* the provision of crime evidence collection kits and training, as is evident from the above Illinois example. We therefore recommend that SAPS be obliged to develop and administer a program to train all medical personnel involved with the collection of forensic medical evidence in the correct use and application of the appropriate crime evidence collection kits. We further recommend that mechanisms be developed to ensure that the national and provincial Departments of Health and the various controlling**

since the beginning of 2000.

⁵⁷National Instruction 22/1988, section 8(3).

bodies⁵⁸ in the medical field co-operate with SAPS in this program as it pertains to the medical aspects of evidence collection.

3.3.2.10 The medical examination performed to gather evidence to aid in any future prosecution can be experienced by sexual offence victims as an extension of the assault. Medical staff also tend to dichotomise sexual violence and more specifically rape as either legitimate or not. Victims are often not told what the examination will entail and the reasons for conducting certain tests. Information given to a victim of a sexual offence with regard to the examination is often superficial.

3.3.2.11 **It is recommended that the victim⁵⁹ should be given information regarding the reason for the examination and what it entails, information on possible pregnancy as a result of the attack, an explanation of any medication given and possible side-effects,⁶⁰ the results or outcome of the medical examination and information about HIV, regardless of what kind of medical officer conducts the examination.**

3.3.2.12 **Despite the risk of contracting HIV or STDs through being sexually assaulted, district surgeons are not procedurally obliged to raise the issue with such victims. Aside from the potential health consequences, if it is not established at the time of the sexual offence that the victim is HIV negative and he or she later contracts HIV, it would be impossible to raise this at the trial as evidence or as an aggravating factor in the sexual assault. It is recommended that at the very least victims should be tested and counselled for HIV or referred to an organisation or hospital which deals with the issue.⁶¹ Referrals from district surgeons or medical personnel may include referrals for follow-up medical care, for HIV or STD testing, or for counselling and advice.**

⁵⁸Such as South African Medical and Dental Council, the South African Nursing Council, etc.

⁵⁹Or the caregiver of the victim in the case of a young child or mentally disabled person.

⁶⁰'She (the district surgeon) gave me yet another 12 drugs I had to take simultaneously. I don't know what they were for': Ms Charlene Smith reported her rape in the **Mail and Guardian** dated 9 April 1999.

⁶¹See also Chapter 7 below.

3.3.2.13 It is generally accepted that district surgeons are overburdened - apparently the sheer number of patients makes it impossible to deliver quality care.⁶² This invariably leads to lengthy delays before victims of sexual assault are examined and can cause additional trauma and often the loss of valuable evidence.

3.3.2.14 Problems experienced by victims include the distance they often have to travel to the place where they have to be examined, the length of time taken to transport them to the examination location and the length of time they have to wait for a district surgeon to examine them after they have arrived. Apart from the inconvenience and cost, the geographical distance that victims have to travel could result in the loss of valuable evidence which may link a perpetrator to the crime. The problem of lack of transport is aggravated by the fact that evidence may be contaminated where the victim and the alleged offender are transported in the same vehicle.⁶³

3.3.2.15 In an attempt to address the concerns raised above, the Department of Health has compiled **Uniform National Health Guidelines for dealing with Survivors of Rape and other Sexual Offences**. The Guidelines identify the development of an integrated and co-ordinated process which recognises the following two main functions as being pivotal:

- (a) providing for the care of the victim - both physical and psychological;
- (b) collection of medico-legal evidence for the successful prosecution of the perpetrator in the criminal justice system.

3.3.2.16 The Guidelines state that victims will be attended to by accredited health care practitioners. This term is defined as medical officers, specialists or specially trained nurses who have the necessary skills and knowledge by means of formal and / or informal training and experience. A protocol for the management of victims is also included in the Guidelines.

3.3.2.17 A troubling factor is that the Guidelines have been worded broadly and in a non-

⁶²Apparently one reason for delays is that district surgeons are overburdened because of the very high number of incidences of driving under the influence of liquor they have to test for.

⁶³Hair samples, for example, might easily be transferred were the alleged offender and the victim to use (even when they do so separately) the same vehicle.

committal fashion. Non-compliance with the Guidelines is neither monitored nor sanctioned. The Department of Health, as of September 1998, had not circulated or disseminated the Guidelines to all provinces and they have therefore not been implemented. The Gauteng Department of Health, however, has offered limited training in the form of information sessions on the Guidelines to medical officers in the area.

3.3.2.18 The Guidelines are silent on support mechanisms for medical practitioners who have to examine victims of sexual offences and on reporting mechanisms available to victims where an examining practitioner has conducted the examination in an inappropriate fashion or crossed the line in any way.⁶⁴ It is recommended that provision be made for debriefing or counselling of the medical practitioner as medical practitioners, similar to all other persons who regularly work with victims of sexual violence, are not left unscathed by the continuous exposure to human depravity.

3.3.2.19 It is also essential that treatment options available to victims of sexual offences at state controlled institutions do not differ from province to province. Uniform services should be provided for in official and implementable instructions coupled to appropriate sanctions for non-compliance.

3.3.2.20 The district surgeon system has been criticised as being neither economically efficient nor judicially effective. This criticism is acknowledged as 'mostly valid', although **Drs Coetzer and Fosseus**⁶⁵ point out that the undue haste with which they are to be abolished has lead to three serious misconceptions:

1. The belief amongst many policy makers that every medical practitioner performing clinical district health services can be taught by existing full-time expert district surgeons to perform sophisticated clinical forensic examinations (rape, child abuse, drunken driving), that these posts can then be abolished and that the expertise will then remain within the cadre of existing clinicians. These perceptions are incorrect because: -
 - The staff turnover at these clinics is rapid, requiring constant training inputs which the present system cannot provide.
 - Providing lectures and viewing slides cannot effect training for these complex

⁶⁴See also ACT Community Law Reform Committee **Discussion Paper No. 4: Sexual Assault**, p. 70 et seq on sexual abuse by health professionals.

⁶⁵In a joint memorandum dated August 1998.

technical issues. A skill can only be acquired by performing 50 or 100 examinations one-self under expert supervision. It is impossible to provide this type of training for every clinic doctor.

- Maintaining skills and expertise requires that the practitioner should personally see 50 to 100 cases at regular intervals. At small rural outlets this cannot happen.
- Because no dedicated experts will remain, it is impossible to cater for problem cases or to provide training for new medical officers after the district surgeoncies have been abolished.

2. The belief amongst opinion makers (including women's groups) and the public at large that services dealing with women and child abuse will as a result of the abolition of district services be made more accessible to victims. The fact is that from a purely clinical point of view all the existing services are already accessible for the treatment or referral of violent injuries. What all clinics with a medical practitioner will not be able to provide (now or in the foreseeable future) is an expert forensic medical service which will ensure that rapists and child abusers are put behind bars, where they belong. Unless convictions are effected the already beleaguered criminal system will further deteriorate and the carnage will continue. ...

3. The belief that registered nurses can perform forensic medical duties. There are no exclusive nursing functions in South Africa that are directed specifically at addressing the cause of justice. There has therefore never existed a need for forensic nursing in the practice and theory of nursing. In the meantime an extraordinary demand has been made on the clinic nurse to diagnose and treat minor ailments and to prescribe medicines to patients, while the majority of them are not legally authorised to prescribe such medicines. It would be unfair, even unethical, to add clinical forensic duties to their existing workload.

3.3.2.21 However, the Department of Health has decided to embark on the transition from district surgeoncies to primary health clinics. The belief is that the services will, as a result of the decentralisation to local clinics, become more accessible to victims. In a circular⁶⁶ by the Gauteng Department of Health the policy on the treatment of victims of child abuse at primary health care facilities, district and regional hospitals, and by private practitioners, is systematically set out.⁶⁷ This includes a step-by-step guide assisting health care workers through the medical examination and the completion of the medico-legal report. Theoretically it seems viable and laudable to allow accredited health care practitioners at local clinics to conduct medical examinations of victims of sexual assault. However, one would expect this transition to be accompanied by intensive training, which it is not.⁶⁸ The now almost defunct district surgeons themselves learnt from trial and error, and the system has reaped the results

⁶⁶No. 67 of 1998: Policy and Protocol on the Treatment of Child Abuse Victims.

⁶⁷Previously the sole domain of the district surgeoncy.

⁶⁸**Dr Muller**, Chief District Surgeon, Gauteng.

of this. Without proper training of accredited health care practitioners, there is a real danger that the cycle will repeat itself.

3.3.2.22 A concern held is that although the services may become more accessible and available, the quality of the service given may deteriorate even further. Clinics are traditionally staffed by junior or recently graduated personnel with limited experience and have a high turnover. Without proper training, it is understandable that such medical examiners may feel nervous or apprehensive about participating in court proceedings. They may even try to evade performing clinical forensic duties so as to avoid a court appearance. A leading newspaper reports that in the Western Cape, women who have been raped are now being examined by any doctor - usually the most junior - at community health centres and day hospitals.⁶⁹ The same report quotes a community service doctor as saying 'I am horrified by the treatment my junior colleagues and I are forced to give rape victims'. Although registered nurses do not routinely receive forensic medical training⁷⁰ at present, they will be expected to perform clinical forensic duties.⁷¹ Without appropriate training, this might not be ethical. The same argument applies to general practitioners and other medically qualified persons who have not undergone forensic training.

3.3.2.23 The body of the victim (and the alleged offender) is a crime scene which, without the necessary skill and expertise, will not yield enough or any evidence, resulting in the perpetrator walking free where no other corroborative evidence exists. **Dr Lorna Martin** of the UCT forensic pathology unit endorses this fact by saying that community service doctors are

⁶⁹**Pretoria News**, 15 October 1999, p. 5.

⁷⁰A small number of nurses have received forensic medical training in the Northern Cape. However, only one such nurse is employed in this capacity. See also the presentation by Jamie Ferrell and Makhosane Mohau 'Forensic nursing in South Africa: A revolutionising impact on child maltreatment' at the 13th ISPCAN Congress, 3 - 6 September 2000, Durban.

⁷¹The concept of allowing registered nurses to perform forensic procedures is not totally foreign and seems to be gaining approval in other countries. The Crimes Act 1958 of Victoria has recently been amended by the Crimes (Amendment) Act 1997 to provide that registered nurses may conduct forensic procedures. To ensure compliance with basic standards, the procedure to be followed for taking samples is also included in this Act. See also the recommendations of the Uganda Law Reform Commission **A Study Report on Rape, Defilement and Other Sexual Offences**, p. 86 - 87.

not qualified to examine women who have been raped. 'This is a highly specialised field that requires special training', she said. She continued by saying that 'if the doctors don't know how to collect evidence properly or how to store it correctly the case will never stand up in court'.⁷² In an attempt to assist state doctors who have literally been thrown in the deep end, UCT has initiated a series of workshops on the collection of evidence after sexual assault. Unfortunately these workshops were not well attended and were only presented in the Western Cape. A protocol for the management of women arriving at Groote Schuur Hospital with a sexual offence complaint has been compiled by the forensic pathology unit. This protocol includes a step-by-step approach and detailed forms upon which the doctor's findings can be made.

3.3.2.24 However, given present day realities, the Commission recommends that, regardless the fate of the district surgeency, medical practitioners and other categories of health care practitioners such as nurses should be empowered to examine victims of sexual assault, provide the necessary medical treatment and give expert evidence in court. Obviously all health care practitioners, including medical doctors, should first receive the necessary training and ongoing support in order to enable them to fulfil this function. We further recommend that the Health Professions Council of South Africa (the former Medical and Dental Council) should develop the necessary training manuals and oversee the training.

3.3.3 One-stop medico-legal crisis centres

3.3.3.1 A proposed solution put forward by **Drs Coetzer and Fosseus**⁷³ is that one-stop medico-legal crisis centres be established at academic health centres to provide a 24-hour service to victims of a sexual offence and child abuse, the examination of detainees and the establishment of mental competency to stand trial. These centres should be staffed by competent full-time (former) district surgeons who will render a dedicated medico-legal service, provide in-service training for medical practitioners and nurses and undergraduate and post-graduate training in clinical forensic medicine for medical students, registrars and post-graduate students. An added suggestion is that medical practitioners who do their one-year compulsory

⁷²**Pretoria News**, 15 October 1999, p. 5.

⁷³Memorandum 'Medico-legal services in Gauteng Province' drafted by Dr PWW Coetzer (Department of Community Health, Medunsa) and Dr CG Fosseus (Department of Forensic Pathology, Medunsa) dated August 1998.

community service and who wish to pursue a career in clinical forensic medicine can work at crisis centres under the supervision of full-time district surgeons, who will then occupy dual functional and academic posts. These centres can address the acute shortage of comprehensive medical care, including treatment for and / or prevention of short and long-term physical consequences, emotional support and counselling, and in some cases, psychiatric care for victims of sexual offences.

3.3.3.2 Ideally, trained medical examiners should be accessible and available 24 hours a day and the local police should receive regular updates on who is on duty and at which number. In some areas one-stop centres have been implemented which enable victims to report the incident, be given medical care and receive support all in one place. Allowing the victim to be examined before he or she reports the incident to the police or has a statement taken, and allowing him or her to wash and perhaps put on a fresh set of clothing makes the victim feel more comfortable and therefore reduces secondary trauma.

3.3.3.3 **It is therefore recommended that one-stop centres be officially endorsed and implemented. We believe the preliminary stages of the investigation would be considerably aided by the availability of all the role-players within walking distance of one another.**

3.3.4 **Forensic nurses**

3.3.4.1 **Childline** reports that in KwaZulu-Natal it has been recommended that nurses be trained as sexual assault examiners.⁷⁴ Nurses are often closer to the community members where the clinics are held and where the need for sexual assault examination services exists. **Childline** says few objections to the use of nurses as sexual assault examiners have been voiced by sexual offence victims. Some persons have commented that nurses do not have the legal knowledge and experience to give expert testimony in court. However, in **Childline's** opinion, this knowledge base can be included in the training programme. Some nurses have also expressed fear relating to intimidation. As nurses often live close to the communities that they serve in a professional capacity, some have expressed anxieties regarding reprisals from offenders. This is not an unrealistic fear in communities with high levels of violence and crime.

⁷⁴This is also the recommendation of the Uganda Law Reform Commission **A Study Report on Rape, Defilement and other Sexual Offences**, p. 86.

3.3.4.2 It is worth repeating that specially trained nurses fall within the category of accredited health care practitioners according to the Uniform National Health Guidelines.

3.3.5 **Casualty wards**

3.3.5.1 Most large hospitals have casualty sections. However, the administrations of these hospitals are of the view that unless the victim of a sexual assault was physically injured, a victim should be referred elsewhere.⁷⁵ In general, hospital administrations do not see casualty sections as appropriate places to deal with sexual assault victims due to the high turnover of patients and staff.⁷⁶ If this is indeed the case, then it highlights the necessity for hospital staff in emergency care sections to be fully aware of the services available for victims of sexual violence.

3.3.5.2 In Illinois, the **Sexual Assault Survivors Emergency Treatment Act** (410 ILCS 70/1) prescribes that every licensed hospital which provides general medical and surgical hospital services must provide emergency hospital services to all victims of sexual offences who apply for such services in relation to injuries or trauma resulting from the sexual offence. In addition, every such hospital must submit to the Department of Public Health a plan to provide hospital emergency services to victims of sexual assault. The Act also prescribes certain minimum requirements for hospitals providing emergency services to victims. The relevant section reads as follows:

- (a) Every hospital providing emergency hospital services to an alleged sexual assault survivor under this Act shall, as minimum requirements for such services, provide, with the consent of the alleged sexual assault survivor, and as ordered by the attending physician, the following:
 - (1) appropriate medical examinations and laboratory tests required to ensure the health, safety, and welfare of an alleged sexual assault survivor or which may be used as evidence in a criminal proceeding against a person accused of the sexual assault, or both; and records of the results of such examinations and tests shall be maintained by the

⁷⁵Referrals are made, for instance, to the District Surgeon, a medical clinic, the police, or a local NGO.

⁷⁶This is also the case in other jurisdictions. See, for instance, the Community Law Reform Committee of the Australian Capital Territory's **Discussion Paper No. 4 : Sexual Assault**, par. 106.

- hospital and made available to law enforcement officials upon the request of the alleged sexual assault survivor;
- (2) appropriate oral and written information concerning the possibility of infection, sexually transmitted disease and pregnancy resulting from sexual assault;
 - (3) appropriate oral and written information concerning acceptable medical procedures, medication, and possible contra-indications of such medication available for the prevention or treatment of infection or disease resulting from sexual assault;
 - (4) such medication as deemed appropriate by the attending physician;
 - (5) a blood test to determine the presence or absence of sexually transmitted disease;
 - (6) written and oral instructions indicating the need for a second blood test 6 weeks after the sexual assault to determine the presence or absence of sexually transmitted disease; and
 - (7) appropriate counselling as determined by the hospital, by trained personnel designated by the hospital.
- (b) Any minor who is an alleged survivor of sexual assault who seeks emergency services under this Act shall be provided such services without the consent of the parent, guardian or custodian of the minor. Only the minor's parent or legal guardian can sign for the release of evidence and information concerning the alleged sexual assault.

It is therefore possible to force hospitals by law to conduct medical examinations on victims and alleged offenders of sexual offences and to provide treatment at the same time.

3.3.5.3 The fact that medical personnel who *inter alia* examine, treat or attend to a child in circumstances which ought to give rise to the reasonable suspicion that the child has been ill-treated or suffers from any injury - the probable cause of which was deliberate - are by law⁷⁷ obliged to report these circumstances to the police or a commissioner of child welfare, should be brought to the attention of all hospital personnel. Failure to report is a crime met with sanctions.

3.3.5.4 **It is recommended that the appropriate health instructions address the role of medical staff on duty in a casualty ward when attending to a victim of a sexual offence. These instructions should also oblige such medical staff, when requested to do so, to conduct medical examinations on both victims and alleged offenders in sexual offence cases, to regulate the manner in which medical evidence is to be collected and treated, etc.**

⁷⁷Section 4 of the **Prevention of Family Violence Act** 133 of 1993. See also section 42 of the Child Care Act 74 of 1983.

3.3.6 **Medical practitioners in private practice**

3.3.6.1 Victims of sexual offences might consult a medical doctor in private practice about injuries sustained, to receive treatment, counselling, etc. The type of service received depends to a large extent on the ability of the victim to pay. Victims with the financial means will therefore not face the same difficulties their more indigent counterparts face in accessing quality medical treatment.

3.3.6.2 However, medical practitioners in private practice generally do not see the same number of victim patients at the same level of regularity as for instance district surgeons. The same arguments as regards lack of specialised training, reluctance to give evidence in court, etc. therefore apply.

3.3.6.3 **For the sake of completeness, the recommendation is repeated that all appropriately trained medical personnel, including those in private practice, should conduct a proper medical examination of the victim of sexual violence and treat or refer such victim for specialised treatment or counselling, where appropriate, in the first consultation.⁷⁸ Likewise it is important that medical practitioners in private practice liaise closely with the investigating team to share information on the crime scene, the evidence collected, the injuries sustained, etc. It is also implicit that private medical practitioners who conduct medical examinations of this kind should preserve and treat the evidence collected in the appropriate manner.**

3.3.7 **Training of medical personnel**

3.3.7.1 Issue Paper 10 posed the question as to whether medical personnel should be specifically trained to deal with cases of child sexual abuse. The respondents unanimously agreed that training of medical professionals performing medico-legal examinations is crucial.⁷⁹

⁷⁸See paragraph 3.3.2.3 above.

⁷⁹**Ms Collet Wagner**, Chief Social Worker; **Adv R Songla**, University of the North; **Supt N Nilsson and Insp G Riedeman**, SAPS Youth Desk, Western Cape; **Mr J Meyer**, Legal Services: SAPS, Johannesburg Central; **Adv E Boshoff**, **Department of Education**; **Combined report by members of the SAPS: Child Protection Units, Kwazulu Natal**; **Ms Lerato Soato**, Bloemfontein Child Welfare Society; **Mrs A Dreyer**, **Mrs H Coertze** and **Mrs I Swart**, SA

Drs Gräbe and Du Plessis⁸⁰ state that undergraduate training of medical doctors concerning the physical signs left by sexual abuse, is very limited and that there is no practical training given on how to examine a pre-pubertal child for sexual abuse. They regard specialised expertise in the field of examining children for sexual abuse and the provision of training in the field of medical examination of such children for signs of sexual abuse as a necessity. Various suggestions regarding the area and type of training have been made. **Ms Collet Wagner** is of the opinion that provision should be made in the 4th year curriculum of students in Community Health for in-depth training in the field of sexual abuse. **Ms Hannie Reyneke** would like to see that in addition to this specialised training, refreshment courses take place every two - five years. **Adv Songla** says that in particular, medical professionals should be trained to identify symptoms or characteristics indicative of abuse. Training should also involve information on procedures, pediatrics, psychological aspects, legal aspects,⁸¹ court witnessing, and general mannerism when dealing with child victims (child-friendly approach).

3.3.7.2 Some respondents indicate that although training is necessary to deal with adult victims of sexual offences, it is especially necessary when the victim is a child. **Tshwaranang Legal Advocacy Centre** points out that it should not be assumed that district surgeons are qualified to conduct this type of examination. Also of importance is that children are often too young to testify, and in the case of infants and toddlers, the medical practitioner as expert witness is the crucial witness.⁸²

3.3.7.3 **Mr Neil van Dokkum** further illustrates the need for specific training regarding children by stating that the multiplicity of doctors with different training, experience and approaches who are now involved in this work has led inevitably to variations in the physical examination. He says that these difficulties may be compounded by an inability to put some

National Council for Child and Family Welfare; **Ms Hannie Reyneke**, Vryheid Child and Family Welfare Society; **Tshwaranang Legal Advocacy Centre**; **Mr Neil Van Dokkum**; **Attorney General: Transvaal**; **Ms WL Clark**, Senior Public Prosecutor, Verulam; **Ms Tuli Madonsela**, Department of Justice; **Mr P Nel**, **Prosecutor**, Port Elizabeth; **Dr JM Loffell**, Social Work Consultant, Johannesburg Child Welfare Society.

⁸⁰RP Clinic Medical Forensic Unit.

⁸¹The need for training on legal issues is also stressed by Adv E Boshoff of the (national) **Department of Education**.

⁸²**Mr J Meyer**, Legal Services: SAPS, Johannesburg.

physical signs into proper perspective because of the lack of normative data about the range of appearances in children who have not been abused and others with a variety of medical complaints. For example, the following are often presented as evidence of sexual abuse in children: the presence of a venereal disease or vaginal discharge, the presence of HIV/AIDS, behaviour disorders or attempted suicide. He avers that one does not have to be an expert in child health to recognise that these so-called symptoms of abuse are regularly displayed by healthy or non-abused children and are therefore hardly conclusive evidence, especially when considered in isolation. The physical examination and procedures are extremely important from an evidential point of view, and it is important that they are carried out in a systematic and objectively defensible fashion. He suggests that a standard form report sheet be drawn up by the Medical and Dental Council to ensure uniformity and consistency of approach.

3.3.7.4 Some respondents are less optimistic about general training of medical personnel. **Ms W L Clark** states that ideally medical personnel should be specifically trained to deal with sexually abused children. However, she is of the opinion that it is always best to have a child victim examined as soon as possible after the event as in reality a lot of cases are emanating from rural areas where specifically trained personnel are not readily available. She contends that valuable medical evidence may be lost if there is a delay in examining the victim, especially in cases not involving penetration. Although Ms Clark acknowledges that specialised training including a course in paediatrics or even a specific training course on sexual abuse would be of help in classifying a medical practitioner as an expert witness, she says that experience is probably even more important than specialised training. This comes with time. She says an experienced doctor, even an ordinary general practitioner, would be able to know what signs to look for in a case of sexual abuse. **Dr JM Loffell** is similarly of the opinion that a medical examination for suspected sexual abuse is a specialised task both from the point of view of the skill needed in making this type of evaluation,⁸³ and also in terms of the need to prevent secondary abuse of the child, for whom these proceedings can feel like a repeat of the molestation. She is further of the opinion that specialist personnel should conduct the examinations in areas where large numbers of children are constantly being dealt with and that in areas where few children need to be there should nevertheless be doctors or nurses on hand who have been equipped with the necessary specific skills for this purpose. However, the **National Council of Women of South Africa** says there are not enough medical personnel to provide specialised services for all victims and that for practical purposes any doctor or sister

⁸³Dr Loffell is of the opinion this is beyond the competence of many practitioners.

should be called upon in cases of alleged sexual abuse.

3.3.7.5 Several respondents moot the idea of a team approach for improving the investigation of sexual offences. **Supt N Nilsson and Insp G Riedeman** say that a team of identified role-players, including a medical practitioner, should be mobilised when a case is reported. In the same vein, **The National Council of Women** urges the Departments of Justice and Health to introduce a joint system of medical and counselling services for victims of assault and rape. The Council states that many victims are faced with high medical bills, which they cannot afford, while the perpetrator receives treatment at the State's expense if injured or ill.

3.3.7.6 In the absence of one-stop centres the **SAPS: Child Protection Units, KwaZulu Natal** propose that the current venues used by district surgeons be upgraded and that special waiting and consultation rooms should be made available. They also recommend that more female district surgeons be made available.

3.3.7.7 It should be realised that medical practitioners are not the only persons who need training concerning the medical examination of sexual abuse victims. As stated above, medical evidence of sexual abuse is accorded a high evidentiary value in criminal prosecutions as it is considered objective proof of the nature of the alleged sexual activity. The legal profession in particular needs training on the medical issues involved. **Drs Gräbe and Du Plessis** point out, for instance, that it is common to expect medical evidence to be present in cases where penetration occurs. According to **Drs Gräbe and Du Plessis** this is a serious misconception. They state that in many cases of penetration no physical evidence of the abuse can be medically detected after some time has elapsed,. They are therefore of the opinion that it is of vital importance that all parties involved, such as social workers, the CPU and uniformed police, prosecutors, attorneys and magistrates, should view the presence or absence of medical evidence in its true perspective.

3.3.7.8 **To conclude, it is recommended that all medical personnel, whether in private practice or not, should be specifically trained to deal with cases of sexual abuse. The training should extend to the performance of medico-legal examinations, the correct use of the crime kit and the significance thereof, the completion of the required forms (such as the J88), police procedure and the legal aspects surrounding the presentation of such evidence in court. It is further recommended that police officials, legal**

practitioners and other role players who provide services to victims of sexual violence receive training on the medical aspects of sexual violence.

3.4 Public prosecutors

3.4.1 Introduction

3.4.1.1 In terms of section 179 of the Constitution a single national prosecuting authority was established. The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out necessary functions incidental to instituting criminal proceedings, including to discontinue criminal proceedings.⁸⁴ The National Director of Public Prosecutions (NDPP) is obliged to determine prosecution policy and issue policy directives.

3.4.1.2 The decision to prosecute an offender is made in accordance with prosecution policy and guidelines. The decision is not made lightly and many factors are taken into consideration.⁸⁵ The initial consideration will be the adequacy of the evidence. Generally, a prosecution should not be instituted or continued unless there is reliable evidence to provide reasonable prospects of a conviction. The evidence generally includes a statement from the victim, any other relevant witnesses and a statement by the accused.

3.4.2 National Guidelines for Prosecutors in Sexual Offence Cases

3.4.2.1 The Department of Justice disseminated National Guidelines for Prosecutors in Sexual Offence Cases during May 1998. The Guidelines made specific provision for sexual offence cases to be dealt with by specialist prosecutors and prescribes how consultations with victims, accredited health care practitioners and the police should be dealt with. To minimise the trauma already experienced by victims, prosecutors are urged to keep victims informed, ensure their privacy when going to court, where necessary to arrange for proceedings to be

⁸⁴Section 179(2) of the **Constitution**, 1996. See also section 20 of the **National Prosecuting Authority Act** 32 of 1998

⁸⁵Whilst a number of general principles may be articulated it is not possible to reduce such an important discretion to a mere formula. Plainly, the demands of fairness and consistency are important considerations but the interests of the victim, the alleged offender and the general public must be taken into account.

held in camera and where a child is involved to approach the magistrate to allow the use of an intermediary. The general approach regarding bail is that applications for bail must be opposed. The Guidelines encourage the prosecutor to object to unnecessary, aggressive and badgering cross-examination and to oppose delaying tactics or adjournments. With regard to sentencing, the Guidelines require prosecutors to place victim impact statements before the court. The Guidelines reinforce the fact that the prosecutor also does not have to accept a sentence which is too lenient.

3.4.2.2 The Guidelines seek to ensure that proper consultation takes place between the specialist prosecutor and the victim, the accredited health care practitioner and with police. One example of the general nature of the Guidelines in this regard should suffice:

Where possible the prosecutor must consult with the police who investigated the case, particularly those likely to be called as witnesses. Discussion to ensure that all necessary documents and exhibits are available will assist the smooth running of the case.

3.4.2.3 It makes little sense, for instance, to impose a duty on the police to consult with the prosecutor without placing a reciprocal duty on the prosecutor. It is therefore important to ensure that all agencies involved in the management of sexual offence cases work together closely as a single unit.

3.4.2.4 Training on the contents of the Guidelines was offered shortly after their dissemination. However, this training was not compulsory, effectively leaving the very persons who needed to be trained to their own devices. Non-compliance with the Guidelines is also not sanctioned, leaving victims who feel dissatisfied with the treatment they have received with no remedy linked to the Guidelines.

3.4.3 **NDPP Policy Directives**

3.4.3.1 The office of the NDPP officially released policy directives on 1 October 1999. Part XXVI of the directives specifically addresses the manner in which sexual offence matters should be dealt with. The directives state that as specialist treatment for these cases is needed, a prosecutor assigned to a sexual offence case should be selected on the basis of his or her personal make-up and ability to relate to such victims. Once a prosecutor has been assigned to the case, the directives require that such person should follow the case through the

trial stage until its conclusion. Prosecutors are directed to avoid unnecessary delays, to prepare thoroughly beforehand, to conduct an in-depth consultation with the victim, to allay any fears the victim has, to familiarise the victim with the court environment and procedures, and to utilise in camera proceedings and intermediaries fully. Prosecutors are advised to oppose bail and where bail is granted, to request the imposition of special bail conditions. The directives emphasise the importance of informing victims of the result of bail applications.

3.4.3.2 For purposes of sentencing, the directives instruct prosecutors to place victim impact statements before the court, i.e. all relevant evidence relating to the impact the crime has had and is likely to have on the victim's life. Prosecutors are also encouraged to address the court on the shortcomings and advantages of alternative sentencing options. In most cases, conviction and sentencing do not take place simultaneously and sentencing is usually postponed for at least a month if not longer. It is the prerogative of the prosecutor to draw to the attention of the court matters relevant to sentencing over and above the circumstances of the commission of the offence. Evidence pertaining to aggravating circumstances must be placed on record during the trial or before conviction. Prosecutors are also encouraged to make use of expert witnesses. The directives also draw prosecutors' attention to the fact that sexual offenders may be declared 'dangerous'⁸⁶ resulting in the offender being imprisoned for an indefinite period.⁸⁷

3.4.3.3. Although reference is made to the advantages of a co-ordinated multi-disciplinary and victim-centred approach, non-compliance with the directives are not sanctionable as they do not place a duty on prosecutors to act in accordance with them. However, the directives contain the following guidelines:

- * the investigation and prosecution of sexual assault cases *can be enhanced*⁸⁸ by a coordinated, multi-disciplinary approach;
- * the prosecutors are *expected* to liaise and cooperate with non-governmental organisations providing services to victims of sexual assault;
- * specialist prosecutions are *required* in sexual assault cases; the investigation of the

⁸⁶Section 286A of the **Criminal Procedure Act** 51 of 1977.

⁸⁷Section 286B of the **Criminal Procedure Act** 51 of 1977. This provision will be dealt with in more detail in the Chapter on sentencing below.

⁸⁸Emphasis is added to illustrate the permissive tone of the directives.

- case should be closely monitored right from the beginning;
- * . . . supplementary statements *should be* obtained from [the victim];
 - * efforts *should be* made to consult with the victim prior to the bail hearing;
 - * the prosecutor who first handles the case *should* follow it through the trial stage until its conclusion - changing prosecutors . . . is undesirable and *should* be avoided at all cost; prosecutors must have a proper consultation with the victim.

3.4.3.4 In reality the prosecutor has considerable discretion in deciding whether to prosecute a case or not and in which court the case should be heard (although serious sexual offence cases are heard in the regional court). Prosecutors generally decide singlehandedly whether the evidence against the defendant merits a prosecution. Frohmann⁸⁹ argues that prosecutors typically justify case rejections on the grounds that there are discrepancies in a victim's story or an ulterior motive in the victim's report of sexual violence. Often such decisions are based on whether the prosecutor believes that a case has a realistic prospect of conviction. Factors which may be decisive as to whether a case will be pursued include the relationship of the offender to the complainant, the circumstances of their first encounter, the amount of force used, the level of resistance shown by the victim and the quality of the evidence.

3.4.3.5 Even though provision is made in the directives for a pre-trial consultation with the victim to familiarise the victim beforehand with the court environment, allegations still abound of victims being given little or no prior warning to attend the trial, let alone adequate warning of a consultation. The excessive caseloads and high turnover of staff are cited as the reason for this state of affairs. A consultation should be arranged between the prosecutor and the victim in advance and not just the day before, on the day of the trial or not at all. This opportunity should be used to provide specific information on court procedures and the roles of the different court officials, to read through and check any statements which have been made and to give advice on how the victim should conduct himself or herself while giving evidence and when answering questions.

3.4.3.6 In order to address allegations that prosecutors are often unprepared, are

⁸⁹Discrediting victim's allegations of sexual assault: Prosecutorial accounts of case rejections' in P Searles and R J Burger (eds) **Rape and Society: Readings on the Problem of Sexual Assault** Oxford: Westview Press 1995, p. 199 - 214 as quoted in Stanton, Lochrenberg and Mukasa **Improved Justice for Survivors of Sexual Violence?** p. 19.

inadequate in countering the allegations made against the complainant and fail to highlight convincing evidence, the directives stipulate that prosecutors must be specifically selected or identified to handle these cases. This move to specialisation must be supported, although it is realised that because of *inter alia* a shortage of personnel this is not always practicable or realistic.

3.4.3.7 In the light of our recommendation in respect of the police that the SAPS National Instruction 22/1998 be revisited and reviewed, if appropriate, we also recommend that the NDPP Policy Directives be revisited and reviewed, if appropriate, ideally with input from SAPS, the health professions and victim support groups. In this context it is very important to be consistent: A situation where one agency is issued with *instructions* and another agency with mere *guidelines* is clearly untenable, especially when the aim is to ensure greater co-operation and interaction between those agencies. It is equally important to ensure that whatever is agreed upon, be it instructions, guidelines or directives, carry the same legal force to ensure that non-compliance can be addressed.

3.4.4 Specialised Sexual Offence Courts

3.4.4.1 One of the first specialised units within the prosecutorial arm of the criminal justice system, which is still successfully operational today, is found in New York. In 1974, the New York County District Attorney's Office was the first such office in the United States to establish a number of speciality teams to deal with specific forms of gender violence. This included a Sex Crimes Prosecution Unit, a Child Abuse Unit and a Domestic Violence Unit.

3.4.4.2 Fairstein,⁹⁰ the director of the Sex Crimes Prosecution Unit, argues that two key features are essential to the success of such a unit. Firstly, it is necessary to recognise that the victims of sexual violence require treatment different to that of any other crime victim. This includes:

- ° very basic practical aspects like removing victims from among the large pool of people

⁹⁰**Sexual Violence: Our War against Rape** New York: Berkley Books 1993, as quoted in Stanton, Lochrenberg, and Mukasa **Improved Justice for Survivors of Sexual Violence?** p. 27.

- waiting for other complaints to be dealt with;
- a more private setting in which to interview victims;
- eliminating the system by which victims are required to repeat their stories to different persons during the course of the prosecution;
- ensuring that cases are handled only by prosecutors who have an interest in the special needs of the victims of sexual violence; and
- directing victims to appropriate medical and counselling services.

Secondly, it is necessary to recognise that sexual offences are more difficult to prosecute than other crimes, due to the intimate nature of the evidence that must be elicited from the complainant, the evidentiary requirements for a conviction and the general lack of understanding of why such crimes occur.

3.4.4.3 In the Australian Capital Territory, a specialist prosecution section was established in 1992. This section fulfils a vital liaison function with the Australian Federal Police Sexual Assault and Child Abuse Team.⁹¹ It also means that one prosecutor sees all cases that come to the office concerning sexual offences.

3.4.4.4 As a consequence of an increasing number of sexual offence cases and the complexities in prosecuting such cases, specialised sexual offences courts were introduced in South Africa. The first specialised sexual offence court was opened at the Wynberg Regional Magistrate's Court in Cape Town on 2 March 1993. The objectives of this court were to reduce or eliminate inappropriate and insensitive treatment, or secondary victimisation, of sexual offence complainants, to develop a co-ordinated and integrated approach to the management of sexual offence cases by criminal justice agencies, and to improve the reporting, prosecution and conviction rate for sexual offences.⁹² The Department of Justice has stated that the 'purpose of the court is to effect more sympathetic and specialised treatment of plaintiffs and prosecutions'.⁹³

⁹¹This special police unit within the Major Crime Branch is responsible for investigating only sexual offences and cases involving physical abuse of children.

⁹²Stanton, Lochrenberg and Mukasa **Improved Justice for Survivors of Sexual Violence?** p. 1.

⁹³**Annual Report of the Department of Justice**, 1 July 1992 - 30 June 1993 at 97

3.4.4.5 A courtroom known as G-court is the Sexual Offence Court in Wynberg. This court and its associated staff differ substantially from other regional Magistrate's Courts. A brief overview of the differences which exist between this Sexual Offence Court and the Magistrate's Court follows:⁹⁴

- Two prosecutors, instead of one as in other courts, are assigned to the Sexual Offence Court. They are prosecutors who have expressed a specific interest in working with sexual offence cases.
- The Sexual Offence Court prosecutors are responsible for monitoring a sexual offence case from the time that the docket is received by the court until the completion of the case.
- The Sexual Offence Court prosecutors are responsible for deciding whether or not to prosecute a case, what the actual charge should be, whether or not the case should go to the High Court, whether any further police investigation is required and whether or not to oppose bail. In other courts this decision is either taken by the Senior State Prosecutor, if there is one, or by the office of the Director of Public Prosecutions.
- The Sexual Offence Court prosecutors' work time is divided between prosecuting cases in court and consulting with complainants. This is made possible by having 2 prosecutors assigned to the court.
- The Sexual Offence Court prosecutors are expected to consult with all sexual offence complainants.
- The courtroom is situated on the top floor of the court building, away from other regional courts on the fourth floor. The district surgeon's offices are located on the same floor as the court.
- A private waiting room is also situated on the top floor, next to the offices of both the Sexual Offence Court prosecutors and the Victim Support Services Co-ordinator.⁹⁵
- As not all cases can be heard in the Sexual Offence Court itself, the Sexual Offence Court prosecutors screen cases to decide which trials will be heard in other Wynberg

⁹⁴The differences are listed in Stanton, Lochrenberg and Mukasa **Improved Justice for Survivors of Sexual Violence?** p. 46.

⁹⁵Wynberg is the first magistrates court in South Africa in which a Victim Support Services Co-ordinator is provided for sexual offence complainants. This full time position is filled by a social worker who is paid by and accountable to the Welfare department. Copies of reports, written by her for the Welfare Department, are forwarded to the office of the DPP.

regional courts and which will go to the Sexual Offence Court itself. This decision is entirely at the discretion of the Sexual Offence Court prosecutors. All cases, irrespective of where the trial is heard, are supposed to be monitored by the Sexual Offence Court prosecutors and the special facilities, such as the waiting room and the Victim Support Services Co-ordinator, are available to such complainants.

- Sexual offence cases of both adult and child complainants are dealt with by the Sexual Offence Court.
- Magistrates work on a rotational system. Initially, magistrates presided in the Sexual Offence Court for one month before returning to their usual court. This system was criticised by magistrates and later changed so that magistrates now preside in Sexual Offence Court for one week every six weeks.
- There is one full-time interpreter assigned to the Sexual Offence Court. The interpreter is also available to assist prosecutors during pre-trial consultation sessions.

3.4.4.6 The Wynberg court model is being replicated throughout the country. At all new court buildings the physical infrastructure must provide for sexual offences courts. In addition, existing court rooms are being augmented with specialised audio-visual equipment for the adjudication of crimes with a sexual content as part of an ongoing upgrading program.

3.4.4.7 In 1998, the Department of Justice established a National Sexual Offence Court Task Team⁹⁶ with the aim of taking the Wynberg Court pilot project further. The broad objectives of the Task Team are -

- to confirm the Wynberg Sexual Offences Court as a model or guideline court;
- to extend the project to every other regional court, nationally;
- to train justice personnel and other stakeholders to handle sexual offence matters; and
- to establish a National Inter-sectoral Task Team to ensure the smooth running of sexual offence matters and sexual offence courts.

3.4.4.8 The Task Team has in effect dissolved.⁹⁷ The Sexual Offences and Community

⁹⁶The Task Team is chaired by Professor Cheryl Loots.

⁹⁷Pending Cabinet approval, the National Sexual Offence Court Task Team and the National Committee on the Strategy for the Release of Statistical Information will integrate to form a new National Intersectoral Co-ordinating Committee. The function of this new

Affairs Unit at the NDPP, under the guidance of Adv Thoko Majokweni, has in any event embarked upon a process of rolling-out 20 sexual offences courts since the beginning of 2000. This process is continuing and it is clear that the Department of Justice and more specifically the NDPP is committed to establishing specialised sexual offence courts and are well on their way to achieving their objectives in this regard. However, the wisdom of rolling-out further sexual offence courts on the basis of the Wynberg model without taking into account the criticisms raised in respect of this model has been questioned.⁹⁸

3.4.4.9 The Commission has no hesitation in supporting the roll-out of specialised sexual offences courts. However, the new courts must be sustainable both as far as human and financial resources and commitment are concerned. Obviously the roll-out must be accompanied by intensive training programmes of all court officials involved, including the magistrates. However, should the original 'Wynberg Sexual Offences Court-model' continue to serve as blueprint for the new sexual offences courts being rolled out, we wish to point out that this model has been evaluated and that certain shortcomings have been identified. These shortcomings of the 'Wynberg Sexual Offences Court-model' must be addressed in the roll-out of the new courts in order to prevent the replication of inadequacies already identified.

3.5 Correctional Services

3.5.1 The Department of Correctional Services plays a vital role in the management of sexual offences and sexual offenders in particular. This agency must, in terms of the **Correctional Services Act** 111 of 1998, ensure that sentences and orders imposed by the courts on offenders are carried out.

3.5.2 Correctional Services personnel, however, may make decisions about the treatment of and release of the offender, which are contrary to the intention of the sentencing magistrate. The magistrate, for example, may order that the offender receive treatment of a specific nature or for a specific duration while in prison. This might not always be possible,

Committee apparently will be to co-ordinate the various initiatives regarding sexual offences in the different government departments in order to develop and facilitate a holistic response.

⁹⁸Especially at the National Intersectoral Sexual Offences Forum meeting held in Cape Town on 17 and 18 February 2000.

even though almost all provinces now offer sex offence specific treatment programmes. Indeed, the offender may refuse to participate in any programmes which do exist. It therefore can happen that the offender can leave the prison environment after completing his or her sentence without having received any therapy services at all.⁹⁹

3.5.3 The Department of Correctional Services also plays a pivotal role in parole hearings, the monitoring of persons on parole, placement on correctional supervision, community services programmes, and the conditional or unconditional release of sexual offenders. The release of sexual offenders on parole or correctional supervision has a major impact on victims and communities alike. In this regard, the Department of Correctional Services' National Guidelines provide that all prisoners in the sentence category longer than 12 months' imprisonment must attend a parole board hearing. Special attention must be given to the victim and the community in general when dealing with sexual offenders. Guidelines are prescribed for parole boards when dealing with sexual offenders. If parole is granted, for instance, stricter conditions of parole and supervision are recommended.

3.5.4 With a view to taking the views of victims into account at parole hearings, the National Guidelines provide that a victim who has made known that he or she wishes to know when a particular prisoner will be released, must give the investigating officer his or her personal details and keep the Commissioner of Correctional Services informed of his or her latest address. The Commissioner will then inform the relevant parole board of the particulars of the victim and the parole board must then inform the victim in writing of the pending parole hearing, date of parole or release.

3.5.5 The development and availability of programmes for the prison population depends entirely on the commitment, involvement and discretion of the social worker or psychologist assigned to a particular prison. No uniform standards exist for sexual offence programmes and no obligation rests on any care-giver within the Department to provide such services. Also troubling is the open-ended statement in the National Guidelines that 'development programmes and/or treatment programmes for all prisoners convicted of crimes of sexual violence will be provided as human resources are made available'. Surely where human resources are lacking the development of such programmes can be outsourced. If a solution is not found, sexual offenders who have not been rehabilitated, but who have served

⁹⁹See also Chapter 44 on the treatment of sexual offenders below.

their time, soon will be roaming the streets again.

3.5.6 The National Guidelines provide that the parole board is obliged to take note of the presiding officer's remarks or recommendations and, where long term imprisonment has been imposed, the parole board must approach the trial court on its views regarding the possible placement on parole of such prisoners prior to making any recommendation. The Chairperson of the parole board has the discretion of inviting two members of the community or a person who may provide meaningful input regarding a specific case, to attend the hearing. The parole board is also obliged, in terms of the Guidelines, to take written representations relevant to the case into consideration.

3.5.7 A problem which have been encountered by the Department of Correctional Services is that presiding officers, especially magistrates, do not place on record that the offender must serve at least two thirds of the offence before the offender can be considered for release on parole.

3.5.8 **Tracing of victims is also problematic in that victims do not always inform the Commissioner of their most recent addresses. Where a victim initially elects not to have his or her particulars recorded, it is recommended that a mechanism be put in place whereby the victim may have his or her details recorded at a later time. It is recommended that the sexual offender not be allowed access to a copy of this report or the disclosure of the victims particulars. Access to the particulars of the victim could make the victim particularly vulnerable towards the offender, especially where the offender did not know the victim's identity at the time he or she committed the offence. Reprisal attacks by the offender once he or she has been released and intimidation by the family and friends of the offender are not uncommon.**

3.5.9 **We also recommend that the victim should be entitled to obtain information from the Department of Correctional Services regarding the programmes which the offender has attended or is involved in.**

3.5.10 **Warrants of committal to prison do not contain details of the specific offence committed by the offender. These details are crucial to assess the suitability of offenders for rehabilitation programmes and for purposes of parole. It is recommended**

that provision be made for the inclusion of details of the offence which may be required to make an informed decision regarding the rehabilitation programme made available to the offender. It is important that this and any other relevant information be conveyed from the Departments of Justice and Safety and Security to the Department of Correctional Services in a confidential manner. Access by the offender to this information will be subject to the provisions contained in the Access to Information Act, No 2 of 2000.

3.6 Social Welfare Agencies, NGO involvement, support, counselling, and advocacy services

3.6.1 In 1997 the Department of Welfare, as it was then called, participated in the compilation of the Inter-sectoral guidelines discussed above. Subsequently the Department issued procedural guidelines, i.e **Procedural Guidelines to Social Welfare Agencies and Appropriate NGOs in Assisting Victims of Rape and Sexual Offences**. These guidelines highlight the desirability of appropriate training in trauma counselling for social workers in order to equip them to deal effectively with victims of sexual offences. Specific procedures are tabulated in these guidelines, including a detailed list of immediate and long term actions. In terms of the guidelines social workers employed by the Department of Social Development should interact with the investigative team and take a leading role when a victim discloses or reports a sexual offence directly to the social worker. These social workers should also impart specified information to the victim and assist the victim before and during court proceedings. They are also tasked with keeping in touch with the responsible police officials in order to keep the victim informed of progress of the case. Social workers are encouraged to interact with NGOs with specialised services where they are unable to render such services to victims of sexual offences.

3.6.2 As the South African Law Commission Review of the Child Care Act Project¹⁰⁰ will specifically consider and make recommendations regarding the services rendered by state social welfare services to children in need of care, including child victims of sexual offences, this aspect will not be dealt with here.

3.6.3 The availability of NGOs who are able and willing to assist victims and

¹⁰⁰Project 110.

perpetrators of sexual assault vary from area to area. They seem to be more developed and concentrated in better resourced provinces and in urban areas. Rural areas are traditionally very under-resourced and few NGOs have the financial or human resources to decentralise. In addition to this no monitoring body exists to monitor the quality of service provided by these NGOs. The agencies discussed above are encouraged departmentally (but not obliged) to refer victims of sexual assault to appropriate NGOs for support. Of concern is the fact that there is no way that a referring official can ascertain whether the victim will indeed receive the support that he or she needs without being further traumatised, until after the service is delivered.¹⁰¹

3.6.4 **Rape Crisis, Cape Town**, one of the better known Western Cape based NGOs in the field, for instance, provides counselling services to all rape or sexual assault victims over 14 years of age. Face to face counselling services are provided during office hours, after hours or over the weekend by appointment.¹⁰² Telephone counselling is provided 24 hours a day.¹⁰³ Rape Crisis also provides pre-trial consultation services to victims due to appear in court and advice and counselling services to friends and family members of victims. The organisation works with a variety of other organisations and institutions with the aim of reducing sexist attitudes, raising awareness about the effects of sexual violence, informing victims of their rights and recourse and with youth in a schools education programme. Rape Crisis further runs internal and external training courses, undertake research and lobby for change in the legal and medical procedures to give better services to victims in sexual offence cases. It receives no state support.

3.6.5 Another prominent NGO, **Childline**, specifically addresses the needs of child victims of abuse. Childline used to be based only in KwaZulu-Natal,¹⁰⁴ but Childline Centres

¹⁰¹Interesting also is the fact that some studies have found that, with the exception of religious leaders, comparatively few victims sought help from less formal service providers such as community organisations, student representative councils, unions or women's groups. See, for instance, Bollen, Artz, Vetten and Louw **Violence against women in metropolitan South Africa (A study on impact and service delivery)** ISS Monograph Series no. 41, September 1999, p. 49.

¹⁰²In 1999, approximately 474 clients were seen for a total of 1 243 counselling sessions.

¹⁰³In 1999, approximately 4 248 victims received telephonic counselling.

¹⁰⁴The first Childline was established in South Africa in KwaZulu-Natal during June 1986 in response to the plight of a number of child victims of abuse treated at a provincial hospital.

have now been established in six of the nine provinces in South Africa.¹⁰⁵ However, the toll-free telephone counselling service by Childline provided for children extends over the entire country. This service is available 24 hours seven days a week. Lay and professional counsellors are trained to work on the telephone crisis lines in a child focussed manner.¹⁰⁶ At present the Childline Centres collectively receive approximately 20,000 calls per month and the calls cover a wide variety of children's problems and needs.

3.6.6 Apart from the telephone counselling service all the Childline Centres have well established or are establishing specialised treatment services for abused children. The majority of children who receive treatment services are victims of sexual abuse. (In KZN this constitutes over 90% of all children who are referred for therapy). The children range across all age groups (in KZN approximately 50% of all children in therapy for sexual abuse are under the age of 7 years) and therefore treatment services also attend to the needs of the caregivers of the children in therapy with regard to caregiver management of the child's trauma. Some of the Childline Centres offer a treatment service to adult victims.

3.6.7 All the Childline Centres run extensive education and prevention programmes in their respective provinces. These programmes are run in schools, community groups, with professional groups such as teachers, as well as school children, concerned citizens, church groups, etc. Gauteng Childline provides a safe house emergency care service for children who require urgent and after hours removal. In other provinces this service is not offered on the same scale by the Childline Centres. Childline KZN runs an extensive service and programme for sexual offenders – both adult and adolescent. This activity is seen as a long term preventive effort. Some of the other regional Childline Centres plan to duplicate this service in their

¹⁰⁵The Provincial Childline services are autonomous with regard to fundraising, management committees, the management of resources as well as the development of services specific to the needs of abused children in their region. For example three of the Childlines, KZN, Western and Eastern Cape, run support and preparation programmes for children appearing in court as victims/witnesses in criminal matters. However in Gauteng this service is provided by another NGO and so Childline Gauteng does not duplicate this service.

¹⁰⁶However calls from adults with concerns about children are also dealt with and often counselling a parent or caregiver may prevent a situation from developing into one in which a child is abused.

provinces.

3.6.8 There is a national affiliation of all the regional Childline Centres called Childline South Africa, which has recently approved a national constitution. A National Co-ordinator has been appointed to assist with the co-ordination of the work of the Provincial Childlines and to assist with national fundraising and public relations projects.

3.6.9 Gauteng based NGOs such as **ADAPT, NISSA, POWA**,¹⁰⁷ and **Men for Change** also provide counselling services for victims of sexual violence. Some, like ADAPT and POWA also prepare victims for their court appearances. Most of these organisations receive referrals from the police and maintain good working relationships with the local control prosecutor and the chief magistrate.

3.6.10 **As these examples show, NGOs play an important role in the management of sexual offence cases. Excellent services are provided by some of these NGOs. However, it is recommended that all persons who work in this field and NGOs who wish to assist sexual offence victims or offenders undergo an accredited training course and that standards or codes of good practice be developed in order to ensure quality service.**

3.6.11 As much as it is the duty of government officials to provide victims with the necessary support or to refer victims to NGOs for support, the non-governmental agencies focussing on supporting victims of sexual offences should actively engage with criminal justice officials and in so doing keep victims up to date with the progress of their respective cases. We say this because certain NGOs advise victims to by-pass State structures and not to go the criminal prosecution route. In some instances, NGOs operate in ignorance of the law or flagrantly break the law by *inter alia* not reporting cases of sexual abuse of children despite the clear provisions of the **Prevention of Family Violence Act**, 1993 and the **Child Care Act**, 1983 in this regard. While we understand why this unfortunate state of affairs does occur, we would prefer to see the relationship between the formal Government structures and the NGO sector as a true partnership where both parties work together as equals to serve the needs of the victims of sexual offences.

3.7 Conclusion

¹⁰⁷People against Women Abuse.

3.7.1 It is generally agreed that victims of sexual violence need many diverse services: emergency shelter, medical care, protection, financial assistance and counselling services, to name but a few. Since one agency alone cannot offer all these services, it is imperative that services are well co-ordinated and that the various professionals understand how other agencies view the problem and deal with it.

3.7.2 However, it is equally clear that there is a lack of co-operation between the various government services, such as the police, the courts, social welfare and health.¹⁰⁸ There is also a lack of co-operation between various government agencies and the NGOs working in the field. This lack of collaboration between agencies results in services for victims of sexual abuse being prone to fragmentation, discontinuity and inaccessibility.¹⁰⁹

3.7.3 **The Commission wishes to state emphatically that the above dissection of the various agencies involved in cases of sexual violence should not be seen as an endless barrage of critique, but rather as a mechanism to streamline best practices and to circumvent weaknesses. The individual and collective commitment to better service delivery is commendable and the personal cost to such committed individuals is acknowledged and their selflessness applauded.**

¹⁰⁸Human Rights Watch / Africa **Violence against Women in South Africa**, p. 87.

¹⁰⁹See also Anshu Padayachee 'Inter-agency liaison: A problem in the treatment and prevention of wife abuse' 1992 (vol. 5, no. 1) **Acta Criminologica** p. 66 - 67.

CHAPTER 4

JOINT INTERVENTION

4.1 Introduction

4.1.1 One of the themes that emerges across the recent literature is the need for a multi-disciplinary, multi-sectoral approach in responding to the needs of victims of sexual offences.¹ Although there are numerous initiatives to establish an inter-agency or multi-disciplinary approach to the reporting, investigation and prosecution of sexual offences in South Africa, it remains fragmented and ineffective.² There are no formal structures which facilitate or make the implementation of a joint criminal justice intervention for sexual offences imperative.

4.2 Submissions

4.2.1 The Commission stated in Issue Paper 10 that the solution to the problems experienced in the manner in which sexual offences are currently being dealt with seems to lie in joint intervention by the police, social services, health services, the education authorities, the judiciary, correctional services, and the NGO sector.³ Based on this assumption Issue Paper 10 then posed the question as to how the joint intervention process should be structured.

4.2.2 The majority of the respondents are in favour of a joint intervention process.⁴

¹E Cox 'Developing strategies : Efforts to end violence against women' in M Schuler (ed) **Freedom from Violence : Women's Strategies from around the World** New York: OEF International, UNIFEM, 1992.

²Human Rights Watch / Africa **Violence against Women in South Africa**, p. 87.

³Issue Paper 10, par. 5.4.4.

⁴**RP Clinic; SAPS Provincial Commissioner Western Cape; SAPS Kwazulu Natal Child Protection Units; SAPS Legal Services East Rand; Tshwaranang Legal Advocacy Centre; Mr J J Brits; Ms W L Clark, Senior Public Prosecutor Verulam; Ms Thuli Madonsela, Department of Justice; Johannesburg Child Welfare Society; Association for the Physically Disabled, Eastern Cape; Vryheid Child and Family Welfare Society.**

Adv R Songoa of the University of the North advises that joint intervention should consist of professionals from different disciplines and that specialist assessment teams should be set up in each province to handle particularly complex cases of abuse. He says that intervention should at this stage be prescribed by protocol, 'so that it can continuously be improved and adapted to suit changes'.⁵

4.2.3 The idea of specialised teams being assigned to investigate sexual offence cases is endorsed by a number of respondents⁶ who hold the opinion that the team should consist of whatever role-players are deemed necessary, depending on the circumstances of each case. Whatever skills are required to handle the case adequately should be made available.

4.2.4 **Dr Renee Potgieter and Associates, Adv Lekoeneha, and Tshwaranang Legal Advocacy Centre** emphasise the necessity of specialist training for all professionals involved in the investigation. One of the benefits of the joint investigation is that the need for repeated interviewing of the victim is done away with, thereby minimising the exposure of the victim to further trauma.⁷ **Tshwaranang Legal Advocacy Centre** refers to the Santa Monica Rape Treatment Centre⁸ and points out that a multi-disciplinary, child-friendly care-centre (one-stop-shop) staffed with experts would go a long way towards easing the disclosing process, also preventing the unnecessary and repetitive consultations that currently occur.

4.2.5 **Drs September and Loffell**⁹ also regard service co-ordination as a high priority in the case of child protection services because of the wide range of professionals who

⁵This is also the view of the **RP Clinic**, the **SAPS Child Protection Units KwaZulu/Natal**, etc.

⁶**Dr Renee Potgieter and Associates**, RP Clinic Pretoria, **Supt N Nilsson and Insp G Riedeman** SAPS Youth Desk Western Cape; **Combined report by members of the SAPS: Child Protection Units Kwazulu Natal; Ms Hannie Reyneke**, Vryheid Child and Family Welfare Society; **Tshwaranang Legal Advocacy Centre; Ms W L Clark** Senior Public Prosecutor, Verulam; **Ms Madonsela**, Department of Justice; **Ms K Buys**, social worker, NG Church Orange Free State.

⁷**Ms W L Clark**, Senior Public Prosecutor, Verulam; **Attorney-General: Transvaal**.

⁸The Stuart House project.

⁹**Managing Child Abuse**, p. 43.

determine the quality of services which impact on the lives of vulnerable children. They say South Africa's history and present reality show a serious lack of co-ordination in the child protection services.

4.3 Joint intervention in practice

4.3.1 Introduction

4.3.1.1 There are some precedents for joint intervention in South Africa.¹⁰ In the following section we will mainly concentrate on the investigative directorates established in terms of the National Prosecuting Authority Act 32 of 1998 and the Wynberg Sexual Offences court prototype.

4.3.2 Investigative directorates

4.3.2.1 The investigative directorates established in terms of the **National Prosecuting Authority Act** 32 of 1998, namely the Investigative Directorate for Serious Economic Offences (IDSEO), the Investigative Directorate for Organised Crime (IDOC) and the Investigative Directorate for Corruption (IDC) have embraced the concept of joint investigation teams to achieve their targets of court directed investigations linked to higher conviction rates. In terms of section 7 of this Act the President may establish not more than three investigating directorates in the office of the National Director of Public Prosecutions in respect of specific offences or specified categories of offences. This section entitles the Investigating Director (the head of an Investigating Directorate) to be assisted in the exercise of her or his powers and the performance of her or his functions by deputy directors, prosecutors, officers of any Department of State seconded to the service of the Directorate, persons in the service of any public or other body, and any other person whose services are obtained by the Investigating Directorate for the purposes of an inquiry.

4.3.2.2 The powers, duties and functions relating to the investigative directorates are contained in Chapter 5 of the Act. These are extremely broad and include the power to make

¹⁰Most of them informal. See, for instance, Rita Blumrick and Val Melis 'Informal multi-disciplinary networking leading to better management of court cases involving children', paper delivered at the 13th ISPCAN Congress, Durban, 3 - 6 September 2000.

inquiries, to enter upon premises and to inspect and search those premises, etc.

4.3.2.3 The objectives of these investigative directorates include:

- to conclude the investigation of specified serious offences expeditiously, effectively and efficiently through a multi-disciplinary approach;
- to expedite investigations by undertaking them in a systematic and purposeful manner;
- to ensure co-ordination and liaison with other persons and / or institutions concerned with the investigation and / or prosecution of specified serious offences;
- and to make maximum use of available resources for the investigation of specified serious offences.¹¹

4.3.2.4 These objectives arose from identified problems such as the lack of co-ordination between the various state agencies, lack of expertise of personnel handling specialised cases, cases being postponed for long periods of time because of incomplete investigations by police, etc.

4.3.2.5 An investigating directorate is made up of a number of investigative teams which normally consist of an advocate / prosecutor and one or more police officials, as well as an accountant, if one has been appointed. The Investigating Director is in charge overall.

4.3.2.6 In terms of the relationship between advocates / prosecutors and police officials in the context of the investigation, each group functions as a team, with each member playing an active and integral part of the investigation. Advocates / prosecutors are required to be cognisant of relevant legal developments and to provide guidance in respect of the investigation. They generally lead investigations and take responsibility concerning overall planning and the direction of the investigation, witnesses to be summoned, and searches to be conducted.¹² Decisions are made in group context, but ultimate responsibility rests with the person designated by the Investigating Director to lead the investigation.

¹¹Investigating Directorate: Serious Economic Offences Manual, 3rd edition, June 1999, p. (vi)

¹²The above information on the IDSEO is from the 3rd edition of the Investigating Directorate: Serious Economic Offences Manual, June 1999, 2-1 to 2-15.

4.3.2.7 As a general rule, the police officials are responsible for maintaining the investigative material (docket, investigation files and documentation files), the search of premises, serving of summonses, testifying at bail applications, and taking affidavits. Generally statements are taken from witnesses by both the advocate / prosecutor and the police official. The statements are tape-recorded and then transcribed to ensure accuracy.¹³

4.3.2.8 The Investigating Directorates are prime examples of how the concept of joint investigating teams can work. Prosecutor driven investigations, dedicated permanent police personnel, and the availability of other experts such as forensic accountants, are essential to their success. Part of the success of this multi-disciplinary task team model is based on information sharing and the ability to work as a team.¹⁴

4.3.2.9 It deserves to be mentioned at this point that a unit dealing with community affairs and sexual offences, led by a special director,¹⁵ has been established within the office of the National Director of Public Prosecution. Unfortunately this unit is not an investigating directorate and therefore unable to operate as such. This sexual offences unit advocates inter-sectoral partnerships and has spearheaded a number of inter-sectoral training sessions. As all specialised sexual offence courts are accountable to this unit, it has been instrumental in ensuring that inter-sectoral initiatives are embarked on within these courts.

4.3.3 **The Wynberg Sexual Offence Court prototype**¹⁶

4.3.3.1 The police reported that the biggest strength of the reforms surrounding the Wynberg Court was that it centralised the way that sexual offences were dealt with and had therefore allowed those concerned to become more experienced and specialised. By allowing prosecutors to monitor cases, to identify witnesses that needed to be consulted and to write out summonses themselves, had reduced what the police described as unnecessary work for them

¹³Personal communication between Adv Pithey and Adv Jannie van Vuuren, IDSEO, Cape Town.

¹⁴Personal communication between Adv Pithey and Adv Gerhard Nel, Gauteng Deputy Director of IDOC.

¹⁵Adv Thoko Majokweni.

¹⁶See also the discussion on this model at par 3.4.4 above.

and reduced the time spent sending files between themselves and the court.¹⁷ The prosecutors argued that working in a full-time sexual offences court had broadened their understanding of sexual violence and allowed them to present their cases more strongly and felt that their contact and relationship with the police, in particular the investigating officers, had been strengthened. One police officer said that this had improved because, whereas previously there had been numerous prosecutors and detectives who dealt with sexual offence cases, there were now only specific prosecutors and detectives.¹⁸

4.3.3.2 In a follow-up report,¹⁹ it was found that the Wynberg Court model has been partially successful in terms of achieving co-ordinated and integrated processing of sexual offence cases. From the perspective of state officials, this was mainly manifest in the contact and relationship between investigating officers and prosecutors. In addition, the police reported that the identification of a central place for conducting medical examinations was more efficient, as they had previously frequently been unclear about where to take victims. However, the experiences of complainants suggest that this initiative has failed to provide victims with an integrated and co-ordinated service by the various state agencies involved in the criminal justice system. These concerns are now being addressed.²⁰

4.3.3.3 In identifying the core components for inclusion in an appropriate and effective model for the management and processing of sexual offences cases, the report²¹ recommends that in principle, sexual offence complainants only deal with one official from each criminal justice agency. Victims should therefore only deal with one investigating officer, one doctor, one prosecutor and one magistrate. The report further states all criminal justice officials who deal with sexual offence cases, including magistrates, need to receive ongoing training aimed

¹⁷Stanton and Lochrenberg **Justice for Sexual Assault Survivors**, p. 24. See also Stanton, Lochrenberg, and Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 19.

¹⁸Stanton and Lochrenberg **Justice for Sexual Assault Survivors**, p. 25.

¹⁹Stanton, Lochrenberg, and Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 148.

²⁰Personal communication: Ms Bronwyn Pithey, office of the National Director of Public Prosecutions.

²¹Stanton, Lochrenberg, and Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 157.

at improving their understanding of the particular nature and consequences of sexual violence and the context in which such violence occurs, and at enhancing their capacity to respond appropriately and sensitively to such complainants. Such training should not be piecemeal, but should consist of a well-planned and complete programme, with both specialised aspects concerning each state role-player and combined training, with other state role-players, to facilitate integrated case management.²² The report also states that it is critical for the success of any multi-agency project that joint planning, the development of a common vision and policy framework, a shared understanding of objectives and the clear responsibilities of each role-player, need to be agreed upon prior to the implementation of the programme. Formal inter-agency agreements should be drawn up between all the agencies involved in a multi-agency project regarding their particular responsibilities and roles.²³

4.4 Comparative law

4.4.1 The United States of America

4.4.1.1 In the United States of America the police historically have been responsible for the investigation of criminal offences and the prosecuting authorities responsible for the decision on whether to prosecute or not, and the prosecution of cases.

4.4.1.2 Violence against women in the US is a serious problem and legislation has been passed to address this problem. One piece of legislation which is of relevance to the topic under discussion is the **Violence Against Women Act (VAWA)** of 1994. This Act is designed to begin to close existing gaps and commit the Federal government to addressing the problem of violence against women comprehensively.

4.4.1.3 Of particular importance, VAWA authorises the STOP Programme (Services, Training, Officers, Prosecution) which is administered by the Violence Against Women Grants Office (VAWGO), the Office of Justice Programmes (OJP), and the US Department of Justice. This programme promotes a co-ordinated, multi-disciplinary approach to improving the criminal

²²Stanton, Lochrenberg, and Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 159.

²³Stanton, Lochrenberg, and Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 160.

justice system's response to violence against women. This approach envisions a partnership among law enforcement, prosecution, the courts, victim advocates and service providers to ensure victim safety and offender accountability. States and local authorities are encouraged to restructure and strengthen the criminal justice response to addressing violence against women, drawing on the experience of all participants in the system, including the community.²⁴

4.4.1.4 The VAWA authorises a grant programme providing resources to police, prosecution, prevention, and victim service indicatives in cases involving sexual violence or domestic violence. The funds must be used for any one of seven identified programme purposes described in Chapter 2, 'Law Enforcement and Prosecution Grants to Reduce Violent Crime Against Women', of the VAWA, which include:

- training law enforcement officers and prosecutors to more effectively identify and respond to domestic violence, sexual assault and stalking
- developing, training or expanding specialised units of law enforcement officers and prosecutors targeting violent crimes against women
- developing and implementing police and prosecution policies, protocols, orders and services specifically dedicated to preventing, identifying and responding to violent crimes against women
- developing, installing or expanding data collection and communication systems that link police, prosecutors and courts
- developing, enlarging or strengthening victim service programmes
- developing, enlarging or strengthening programmes addressing stalking
- developing or strengthening programmes addressing the needs and circumstances of Native American tribes in addressing violent crimes against women.

4.4.1.5 The VAWA programme strategy requires that states must demonstrate a statewide commitment to co-ordinate and integrate law enforcement, prosecution and judicial efforts, as well as victim services, in the prevention, identification and response to cases involving violence against women.

²⁴US Department of Justice, Violence Against Women's Office.

4.4.1.6 In August 1999 the Urban Institute²⁵ released an independent evaluation²⁶ of the STOP programme. Their report found that states had made great improvements in their community responses to domestic violence and sexual assault as a result of the grant programme created by the VAWA. Both victims and service providers reported substantial benefits from the programme. It further found that STOP projects that had placed a major emphasis on collaboration for the purpose of bringing about system change had been successful. Many projects used a slow approach, creating substantial change in a single agency in order to stimulate change in other agencies. The most profound system change occurred when community-wide collaboration was developed - with commitment from top management officials, such as police chiefs or district attorneys, along with other law enforcement, prosecution and victim service personnel.

4.4.1.7 Below are two examples of projects funded in part or whole by the STOP programme.

(a) **Family Violence and Sexual Assault Unit, Philadelphia, Pennsylvania**

4.4.1.8 This specialised prosecution unit handles domestic violence, child abuse, and sexual assault cases, allowing for a more holistic, pro-active and sensitive approach to working with victims of these crimes. The unit is staffed by prosecutors, victim advocates, law clerks, district attorney detectives, support staff, volunteers and law and undergraduate students. There is careful recruitment of unit prosecutors, with the prosecutors entering the unit on a voluntary basis being selected on the basis of intellectual and emotional aptitude to do the work. The unit is headed by a Chief Assistant District Attorney and an Assistant Chief who supervise a 19 member unit consisting of 14 prosecutors, three victim witness co-ordinators, a county detective and a Philadelphia police officer. The county detective and a Philadelphia police officer are housed within the unit for post-arrest investigation, evidence gathering and locating witnesses. This unit has proved to be successful in that it has provided continued and co-

²⁵The Urban Institute is a non-profit, non-partisan policy research organisation established in Washington DC to sharpen thinking about societal problems and efforts to solve them, improve government decisions and their implementation, and increase citizen's awareness about public choices.

²⁶Urban Institute 1999 Report: Evaluation of the STOP Formula Grants Under the **Violence Against Women Act** of 1994.

ordinated support to victims, has collected appropriate evidence for prosecution of cases, ensured more victim participation and more effective case management.

(b) **San Diego Police Department, Sex Crimes Unit, San Diego, California**

4.4.1.9 Personnel of the unit are specially trained in sexual offences and its detectives are assigned to each of the city's eight police sub-stations, thus facilitating a more informal and regular level of communication between the unit and patrol officers. Members of the Sex Crime Unit participate along with the San Diego District Attorney's Office on the San Diego Review Committee, the city's sexual assault task force.

4.4.2 **Brazil**

4.4.2.1 In 1985, women's groups, together with the state council on women, persuaded Sao Paulo's opposition party mayor to establish a women's police station, staffed entirely by women and dedicated solely to crimes of violence against women. By late 1985, eight women's police stations (*delegacias*) had opened in Sao Paulo and by 1990 there were 74 throughout the country.²⁷ The women's *delegacias* represented an integrated approach to the problem of violence against women. With the advent of these units the number of reported rapes increased dramatically. It was also found that there were good results in the investigation of the crime.²⁸ Unfortunately, the effectiveness of these units has suffered due to lack of government support.²⁹

4.4.3 **Mexico**

4.4.3.1 In Mexico the municipal government began a joint intervention project in 1989. At this centre, five specialised agencies together provide the victims of sexual offences with integrated legal, medical, and psychological care. Female personnel who have received specialised training are available on a 24-hour basis. On arrival, the victim is seen by a social worker who, together with the victim, determines her short and medium-term needs. The victim

²⁷**Criminal Injustice: Violence Against Women in Brazil**, Women's Rights Project, Americas Watch, p. 11.

²⁸Ibid at 57.

²⁹Ibid at 13.

is then seen by a psychologist and if she decides to report the incident to the police, she can be examined by a female forensic doctor who is employed by the centre. Every victim is accompanied by a counsellor throughout the legal and medical process. If the victim needs longer-term counselling, she is referred to a counselling centre, run by the Attorney-General's office and staffed by trained psychologists, where the victim may receive free counselling services for up to six months.³⁰

4.5 Evaluation

4.5.1 In the National Crime Prevention Strategy (NCPS) it is stated that because of the magnitude of challenges facing government and the reality of limited resources, departments involved in the criminal justice system should focus their efforts on those crimes which have the most damaging effects on the community.³¹ The crimes identified are:

- Crimes involving fire-arms;
- Organised crime;
- Illegal immigrants;
- Drug trafficking;
- Trade in endangered species;
- Gang related crimes;
- White collar crime;
- Gender violence and crimes against children;
- Violence associated with inter-group conflict (including taxi violence);
- Vehicle theft and highjacking;
- Corruption in the Criminal Justice System.

4.5.2 In the prioritising of these crimes the government has committed itself to resource allocation to enable implementation. In virtually every priority area specialised units have been established and resourced to combat the crime. However, it is submitted that although violence against women and children is a priority crime identified by the NCPS, SAPS and the Justice Department, this prioritisation exercise has not been matched with, firstly, a

³⁰E S Cox 'Gender violence and women's health in Central America' in M Davies (ed) **Women and Violence** London: Zed Books 1994.

³¹The National Crime Prevention Strategy 1996 at 30

strategic plan on how to combat these crimes effectively and secondly, the allocation of resources for implementation of these plans. For other prioritised crimes it had been recognised that in order to successfully investigate and prosecute these crimes specialised units have to be established (adopting the multi-disciplinary approach), and resources respectively allocated.

4.5.3 Given the number of sexual offences committed in South Africa and the relatively low rates of referrals of these cases to court,³² it is clear that one of the blockages in achieving convictions for these cases lies in the route from investigation to prosecution. It appears that the police exercise a high degree of discretion in deciding whether cases should be further investigated. This is problematic given the fact that many police members, as with many members of South African society, hold erroneous and fallacious views regarding sexual offences. Based on research conducted in this and other countries,³³ the police have earned a reputation of discouraging victims of sexual violence from pursuing their cases.

4.5.4 However, the police are not the only agency to blame for the poor state of affairs, as highlighted in the previous chapter. The health profession, especially the district surgeon, came in for scathing attack. So did prosecutors, magistrates and social workers.

4.5.5 It is therefore essential that appropriate members of at least the police, prosecutorial service and medico-legal services receive training on how to deal with victims of sexual offences - those who are committed to this work and have the emotional and psychological maturity to be effective in its implementation. It is advisable that joint training takes place on general matters, but that agency specific training still be done separately as the objective is joint intervention and not that medical doctors or prosecutors should become police members and *vice versa*. There is little point in allocating resources to training members of the different agencies who are not committed to the work of sexual offences. It is thus submitted that it would be a saving on resources, both in terms of time and money, to train only those who want to do this work, are found fit to do it, and to allow only those trained adequately to deliver services in the arena of sexual offences.

³²In 1998 49 280 cases of rape were reported to the police. Only 22 189 were referred to court.

³³See generally Stanton, Lochrenberg, and Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 19 et seq.

4.5.6 It is both an international and national trend to establish joint or inter-agency teams to combat priority crimes. In terms of international jurisdictions violent crimes against women and children have been identified as priority crimes and in need of specialisation. Internationally, either specialised police units have been established to investigate these crimes or specialised units comprising of both police and prosecutors to investigate and prosecute.

4.5.7 There is ample precedent in South Africa for the creation of joint or inter-agency teams for the investigation and prosecution of high priority crimes. The model upon which these teams should be established should approximate that used for the establishment of the Investigating Directorates in terms of the **National Prosecuting Authority Act 32 of 1998**.

4.6 **Recommendations**

4.6.1 The need for a multi-disciplinary, multi-sectoral approach in responding to the needs of victims of sexual offences is clear.

4.6.2 **The Commission accordingly recommends that:**

- **A National Investigating Directorate be established for ‘serious sexual offences’, structured in the same way as the other Investigating Directorates. An amendment to the National Prosecuting Authority Act 32 of 1998 would be necessary to facilitate the formation of such an additional Investigating Directorate.**
- **The criminal investigation of all serious sexual offences should be done by a team comprised of specialised police officers and prosecutors, supervised by a prosecutor. This team should be able to call upon the services of health care practitioners, social workers, and other professionals or service providers where necessary.**
- **The categorisation of ‘serious sexual offences’ should be done with reference to Schedule 6 of the Criminal Procedure Act 54 of 1977.**
- **Only specially trained medical personnel, police officers, prosecutors, magistrates and counsellors should deal with serious sexual offences.**
- **Personnel should be carefully selected - only those who show a particular interest and aptitude for this type of work should be allowed to do so.**

- **Preferably all serious sexual offences cases must be prosecuted in special Sexual Offences courts. Where special courts are not available, sexual offence cases must still be dealt with in the appropriate fashion.**
- **All child victims in sexual offence cases in need of care and protection should be able to rely on a responsive welfare system. The issue of children in need of care is, however, addressed in the investigation into the Review of the Child Care Act.**

CHAPTER 5

DISCLOSURE OF THE OFFENCE BY THE VICTIM

5.1 Introduction

5.1.1 Disclosure of a sexual offence by most victims is a slow and painful process. Child victims in particular disclose sexual abuse in a fragmented fashion and the full extent of the abuse will hardly ever be revealed when a child makes the first report. It is also likely that by the time a victim formally lays a complaint with the police that the victim has been made to tell his or her story to various other people.¹ The circumstances and manner in which the disclosure occurs is not predictable and it is therefore not possible to legislate as to when and how disclosure must take place.² It is possible, however, to make recommendations that facilitate and support persons disclosing.

5.1.2 Adult victims of sexual assault who do not disclose or report their sexual abuse require some consideration as well. Frequently the memory of the abuse is suppressed until adulthood. If the victim at this time would want the law to take its course, difficulties can and do arise due to the passage of time. Inconsistencies in evidence, lack of medical or corroborating evidence, prescription and fairness to the accused may, for instance, be in issue. These aspects are addressed in subsequent chapters.

5.2 Submissions to the Issue Paper relating to disclosure

5.2.1 In the Issue Paper the problems related to the manner in which children disclose sexual abuse were highlighted. In essence the problem is that child victims disclose abuse in a fragmented way over a period of time. This causes their evidence in court as to the first report

¹**Dr Renée Potgieter** of the RP Clinic points out that numerous children have been referred to the Clinic over the past few years after having been interviewed / assessed / evaluated by as many as four to eight professional people. >Unfortunately most of these professionals have had no training in the forensic field of investigating cases of child sexual abuse, and clearly used suggestions and leading questions during their interviews. In such cases the child=s memory has been contaminated to such an extent that it is impossible to obtain valid information from the child which would stand a chance of being accepted as a sound testimony in court=. See also the submission by the **Frances Vorweg School for Cerebral Palsied and Learning Disabled Children**.

²See also Lisa Richardson >The opening and closing of pandora=s box: Recantation in children=s accounts of sexual abuse=, paper delivered at the 13th International Congress on Child Abuse and Neglect, Durban, 3 - 6 September 2000.

of the crime to be attacked as a fabrication or being inconsistent.³

5.2.2 Often the problem is not that persons (and children especially) do not disclose sexual abuse, but that they are simply not believed when they do disclose. In its submission, the **R P Clinic** points out that disclosure of sexual abuse has to do with the way in which a child is approached in connection with the disclosure, and how adults react to the disclosure. The Clinic continues:

We can make it easier for children to disclose sexual abuse if we start to believe them. In practice, we often see how children suffer and deny, disassociate, accommodate and literally physically flee away from a situation in order not to reveal abuse. ... Children make a first report and because they are not believed, they either retract the information or deny it, or refuse to make a second report.

5.2.3 The **Association for the Physically Disabled, Eastern Cape - Port Elizabeth region** says steps should be taken to make it easier for children to come out in public to disclose sexual abuse. The Association does not say what these steps should be. The **Association for Persons with Physical Disabilities, Northern Cape** suggests that all stakeholders working with children and the media should be used to create awareness of child sexual abuse and to assist children to disclose such abuse. This suggestion finds strong support in the submission by **Ms W L Clark**, a senior public prosecutor at Verulam. She says:

It would be easier for children to disclose sexual abuse if they were better informed and awareness programmes expanded, both in the formal schooling sector and in a more informal way, such as giving the issue coverage on radio and on television. Teachers, child-minders, nurses and social workers dealing with children can all play a part in helping to >spread the word=. Children=s books could be more open about the topic. Informal theatre and puppet shows could be performed in places where there are children present, such as schools and day care centres, which could also help promote an awareness.

Furthermore, adults must be educated too. Parents, teachers and others having contact with children should be made aware of the signs of abuse and must also be taught to have an understanding attitude. Often abusers threaten young children with the fact that their mothers will punish them if they disclose the abuse. Mothers (and other people who care for children) must be educated to the fact that abuse is not the child=s fault and that they should be able to assure the child that no punishment will be forthcoming if

³See section 190 of the Criminal Procedure Act 51 of 1977. In sexual offence cases it is admissible to prove that the victim has complained to the first person to whom the victim reasonably could be expected to complain. It does not prove the content of the complaint but is admitted to rebut a defence of consent and to prove consistency. See also Kriegler **Hiemstra Suid-Afrikaanse Strafproses** (fifth edition) 515.

he or she speaks the truth.⁴

5.2.4 The need for vigorous education campaigns for children in schools, pre-schools, creches, churches, and community centres of what constitutes sexual abuse is also highlighted by **Ms Thuli Madonsela** of the Department of Justice. She says information on >[w]hat forms of touching, what forms of objects should not be introduced into the body= should be conveyed through the use of pictures, songs and short dramas understandable to children.⁵ In their joint submission, the members of the **SAPS Child Protection Units in KwaZulu Natal** say experience has shown that many disclosures occur at schools. They therefore submit that an intensive training programme for teachers should be developed that must be incorporated in teachers= basic training programmes.

5.2.5 The **Attorney-General: Transvaal** argues that a child friendly care-centre (one-stop-shop) staffed with experts and equipped with videos would certainly go a long way towards easing the disclosure process and also prevent the unnecessary repetitive consultations that presently occur.

5.2.6 The **Johannesburg Child Welfare Society** says the legal system must structure itself to allow the child to be given as much time as necessary, and a comfortable and unpressurized environment in which to disclose at his or her pace. The Society continues:

Where at all possible, disclosure interviews should be videotaped, according to appropriate guidelines and safeguards, and should be admissible in court thereafter. The relevant disciplines should agree on the necessary issues to be covered and the child should not be subjected to repeated investigative interviews - all concerned should be able to use the original tapes.

5.2.7 A particular problem facing deaf children living in school hostels was highlighted by Ms Wilma Newhoudt-Druchen on behalf of the **Deaf Community of Cape Town**. This relates to access to outside help. Where deaf children are abused in a residential setting, the trust is broken and as a result that deaf child will not approach a social worker or teacher inside the school for fear that they are friends of the person causing the abuse. It is taken as a given

⁴The need for public awareness programmes is also identified by **Ms K Buys**, a social worker employed by the Nederduitse Gereformeerde Kerk in Afrika - Orange Free State.

⁵**Tshwaranang Legal Advocacy Centre** supports this contention for schools-based education and adds that in addition Rape Reporting Offices should be set up. Such Offices should be >places of comfort for children and women, staffed by individuals who are deeply sympathetic to the needs of sexual survivors=. See also the submission by the **S A National Council for Child and Family Welfare**.

that the position regarding access to outside help is not any different for other children in residential care settings or for persons in mental institutions.

5.3 Rules of evidence regarding >first report=⁶

5.3.1 Victims of sexual violence and their advocates have expressed concern about the way in which the admission of the victim=s >previous consistent statement= has been handled. As stated in **R v Kgaladi**⁷ this admission merely shows the complainant=s consistency, and it implies a greater >burden= on the State. This additional burden comes from the negative inference that may be drawn from the complainant=s failure to speak to anyone about what has happened before a formal charge is laid. The concern is linked to the general concern about the focus in sexual violence cases on the >character= (or >credibility=) of the victim rather than on the events which led to laying a charge against someone for a sexual offence.

5.3.2 Given that sexual violence often occurs in the absence of corroborating witnesses, the admission of a >previous consistent statement= made by a victim can work to the prosecution=s (and the victim=s) advantage. Where the victim does speak to a friend, family member, priest or counsellor about what has happened before a charge is laid with the police it is important to retain the legal value of such testimony. It is submitted that in **S v S**,⁸ for example, this kind of testimony did contribute towards the conviction of the perpetrator.

5.3.3 As the Commission stated in its 1985 report on Women and Sexual Offences, it is possible for the defence to exploit either the victim=s choice not to discuss the assault, or to use the notion of >reasonable time= to suggest that some disclosures are less valid than others. **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC), and the ANC Parliamentary Women=s Caucus** maintain that this is the area in which reform needs to be legislated.

5.3.4 An example of such legislative intervention is found in the **Victoria Crimes Act**,

⁶This section is taken from the submission by **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC), and the ANC Parliamentary Women=s Caucus**.

⁷1943 AD 255.

⁸1990 1 SACR 5 (A).

1958.⁹ Section 61(1)(b) of this Act reads as follows:

[I]f the evidence is given or a question is asked of a witness or a statement is made in the course of an address on evidence which tends to suggest that there was delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.

5.3.5 In the 1985 Commission report on Women and Sexual Offences,¹⁰ the suggestion is made that >legislation should lay down that absence of a complaint or a related complaint may not be used to cast doubt on a complainant=s credibility=. The issue of previous consistent statements is dealt with comprehensively in Chapter 36 below and we hold over further discussion till then.

5.4 Corroboration regarding unsworn or unaffirmed evidence

5.4.1 In the Issue Paper the question was posed whether corroboration with respect to the unsworn evidence in child sexual abuse cases is necessary. This question was posed as the courts usually look for corroboration of the evidence of a child **so as to reduce the dangers inherent in single-witness testimony**.¹¹ It must, however, be pointed out that unsworn or unaffirmed evidence is admissible provided that the person giving such evidence is admonished by the presiding officer to > speak the truth, the whole truth and nothing but the truth=.¹² The issue of corroboration of the evidence because of the operation of the cautionary rules is dealt with fully in Chapter 38 below.

5.4.2 However, for the sake of completeness and to highlight the difference in opinion, the responses to the Issue Paper on this question are given.

5.4.3 **Adv R Songoa** of the Private Law Department, University of the North, says corroboration with respect to the unsworn evidence in child sexual abuse cases is not

⁹Section 61(1)(b) was amended by Act No. 81 of 1997. See also section 23AB of the New Zealand Evidence Act 1908 as amended by the Evidence Amendment Act (No. 2) of 1985.

¹⁰Section 3.43.

¹¹Du Toit *et al* **Commentary on the Criminal Procedure Act** 22-20. See also **R v Manda** 1951 (3) SA 158 (A) and **Woji v Santam Insurance Co Ltd** 1981 (1) SA 1020 (A).

¹²Section 164(1) of the Criminal Procedure Act 51 of 1977.

necessary. He says the courts should apply a case by case approach and should determine whether the child is mature enough to distinguish fact from fantasy and appreciate the importance of being truthful. He concludes that corroboration should only be insisted upon if the court is of the view or suspects that the child might have been couched.¹³

5.4.4 On the other hand several respondents are of the view that corroboration of the evidence of a child victim remains necessary,¹⁴ while others were clearly divided.¹⁵ **Ms W L Clark**, senior prosecutor, Verulam says that she as prosecutor >unfortunately= feels it is necessary to have corroboration with respect to the unsworn evidence in child sexual abuse cases. She continues:

Even a child abuser has the right to a fair trial. Furthermore, there have been known cases where an unscrupulous adult, often a mother, forces the child to tell a false story so as to spite an erring husband whose only guilt is drinking too much or having affairs with other (adult) women.

5.5 **Placing limits on the right to cross-examine children in sexual offence cases on previous statements made**

5.5.1 If limits could be placed on the right to cross-examine a victim in a sexual offence case on previous statements made, possibly more victims would come forward and lay charges. However, such a step (i.e. placing limits on the right to cross-examine) is not without its difficulties and this aspect is also dealt with more comprehensively below.¹⁶

5.5.2 From the submissions it appears that the respondents are divided on whether limits should be placed upon the right to cross-examine children in sexual offence cases on previous statements made. Some favour limiting cross-examination,¹⁷ while others oppose

¹³Other respondents who are of the view that corroboration is not necessary include **Ms Thuli Madonsela** of the Department of Justice and **Adv K J C Lekoeneha**.

¹⁴Combined submission of **SAPS Child Protection Units, KwaZulu Natal; Ms Collette Wagner**, Gauteng Department of Welfare and Population Development; **Association for Persons with Physical Disabilities, Northern Cape; Mr P Nel**, prosecutor, Port Elizabeth.

¹⁵**SA National Council for Child and Family Welfare** (17 response in favour of the requirement of corroboration, 20 against, and 5 no responses).

¹⁶See Chapter 38 below.

¹⁷Amongst those who favour the limitation of the right to cross-examination are the **Association for Persons with Physical Disabilities, Northern Cape; Ms Thuli Madonsela**, Department of Justice; **Johannesburg Child Welfare Society; Department of Local Government, Housing and Land**

limitation of cross-examination.¹⁸ **Ms W L Clark**, a senior prosecutor, feels that no limits should be placed upon the right to cross-examine children. However, she feels limits should be placed on the **way** a youthful witness may be cross-examined. She states that in cases where no intermediary is available or used, the person conducting the cross-examination should be warned by the court that no aggressive or hostile questions should be asked and that the questioning must be done in a sympathetic manner.

5.6 Evaluation and recommendations

5.6.1 It would appear that some of the increase in rape and other sexual offence statistics can be attributed to greater public awareness, the attention such cases receive in the media, the efforts of NGOs working in the field, and a greater willingness on the part of victims to report incidences of abuse.¹⁹ These initiatives must be sustained and expanded. The question is what can be done in law to facilitate and support persons who wish to disclose sexual abuse.

5.6.2 Some of the legislative options tentatively considered relate to previous consistent statements, corroboration regarding the unsworn or unaffirmed evidence of a child, and placing limits on the right to cross-examine children in sexual offence cases on previous statements made and will be developed further in subsequent chapters. However, it appears that the best way in which to make it easier for victims and children in particular to disclose sexual abuse lies outside the field of law reform in education and public awareness campaigns. In our opinion, the State has a very active role to play and it must either create and maintain or support the infrastructure necessary for making disclosure possible. The State, in conjunction with the NGO sector, should ensure that appropriate educational programmes are conducted in

Administration, Mpumalanga; Mr P Nel, prosecutor, Port Elizabeth; the **SA National Council for Child and Family Welfare** (35 responses); **Ms C Wagner**, chief social worker.

¹⁸The **Attorney-General: Transvaal** maintains that such limitation will in any event probably be unconstitutional. The Attorney-General: Transvaal concedes, however, that some curtailment of cross-examination does seem to be called for where defence counsel tend to manipulate the child with interventions such as >please understand, I am only trying to assist your (poor) mother / father / the accused ...=. Others who do not favour the limitation of the right to cross-examine include the **SAPS Child Protection Units, KwaZulu Natal** and the **Western Cape Street Child Forum**.

¹⁹According to the findings of a recent study for the Institute for Security Studies by Bollen, Artz, Vetten and Louw **Violence against Women in Metropolitan South Africa** ISS Monograph Series No. 41, September 1999, p. 24 women who were sexually abused were less likely compared to victims of other types of abuse to tell someone about the incident. Only 29% of the respondents in their reference group told someone immediately after the event occurred. As many as 41% had never told anyone about the incident at the time of the interview.

schools, that toll-free help-lines exist, that help-desks are manned, etc.

5.6.3 A promptly responsive protection system facilitates disclosure. Dissemination of information to all systems and levels of society about what to do and where to go when abuse is disclosed, is imperative.

5.6.4 **We accordingly recommend that:**

1. Awareness campaigns be conducted by schools and local government structures to make it comfortable and acceptable for children to speak out with confidence in a responsive child protection system. Ongoing life skills programmes should also be introduced as part of the fixed syllabus in schools.
2. Awareness campaigns for adult victims (both male and female) of sexual violence be conducted by the Departments of Safety and Security and Justice and Constitutional Development to instill confidence in a responsive authoritative protection system in order to make it easier for such victims to report incidents of sexual violence.
3. Awareness, information and education programmes be launched and conducted by the appropriate government department(s) for all levels of civil society about what to do and where to go when a person discloses sexual abuse.
4. Police training and protocols should acknowledge the reality that disclosure for victims of sexual abuse is likely to be a process which will take place over a period of time and sometimes even years after the event.

CHAPTER 6

REPORTING AND REFERRAL

6.1 Introduction

6.1.1 One of the most immediate decisions that victims who have been sexually abused have to make is whether or not to report the incident to the police. Once a complaint is filed, the criminal process usually starts. The police should then investigate the complaint and press charges where appropriate. This is the first aspect to be covered in this Chapter.

6.1.2 In terms of current South African law, certain professionals such as medical practitioners and social workers are obliged to report suspected ill-treatment of children. Such ill-treatment obviously includes child sexual abuse. In this context it is customary to discuss mandatory and voluntary reporting. As this aspect falls within the mandate of the investigation into the Review of the Child Care Act, it will be discussed only briefly in the second part of this Chapter.

6.2 Reporting the incident to the police

6.2.1 Internationally and locally, studies have documented the low reporting rate of sexual violence incidents and explored the reasons for this.¹ While the number of victims reporting sexual offences to the police in South Africa has risen steadily over the last few years, no reliable figures exist that indicate the percentage of victims of sexual violence who actually² report such incidents to the police.²

¹See, for instance, Hanmer, Radford & Stanko(eds) **Women, Policing and Male Violence: International Perspectives** London: Routledge 1989; Katz & Mazur **Understanding the Rape Victim: A Synthesis of Research Findings** New York: Wiley 1979; D Russel **Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment** Beverley Hills, California: Sage 1984; S Stanton **A Qualitative and Quantitative Analysis of Empirical Data on Violence Against Women in Greater Cape Town from 1989 to 1991** (Research report prepared for the Human Science Research Council) Institute of Criminology, University of Cape Town, 1993; L Williams >The Classic Rape: When do Victims Report?< (1984) **Social Problems** Vol. 31(4), p. 459.

²Stanton, Lochrenberg & Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 15.

6.2.2 The reasons for not reporting sexual violence to the police are numerous and varied.³ However, the reasons most commonly given are the victim=s feelings towards himself or herself (shame, humiliation, embarrassment and guilt); his or her feelings towards the rapist (fear, pity); his or her feelings towards others (not wanting to upset parents, partner, friends or children) and his or her feelings towards the criminal justice system (of not being believed).⁴

6.2.3 One of the key factors which international studies have found to determine whether or not sexual violence will be reported is the circumstances of the assault itself.⁵ A victim has to feel confident that others, especially the police, will perceive him or her as being a genuine sexual violence victim. Consequently, it is the >classic= rape - a sudden, violent attack by a stranger, where the victim resisted physically and verbally - which is most likely to be reported. Studies of real and hypothetical rape reporting have found that women who are raped by men they know, who are raped without weapons being present, and who experience few injuries in addition to the rape are less likely to report their violation to the police.⁶

6.3 Submissions received

A recent study by Bollen, Artz, Vetten and Louw **Violence Against Women in Metropolitan South Africa** (ISS Monograph Series No. 41) September 1999, p. 49 found that just under a third of the women (30%) had been to the police despite the fact that 89% felt that what was done to them was a crime. In house-to-house interviews with 3 971 women conducted by CIETAfrica **Prevention of Sexual Violence**, October 1998, p. 10 69% of the rape victims reported the incident to the police. This is substantially higher than SAPS estimates and the Bollen et al ISS study.

³The Human Rights Watch / Africa report on **Violence against Women in South Africa**, p. 91 states that widespread reports of police mistreatment of rape survivors contribute to the low percentage of reported cases. >Raped women frequently have to relate their experience over the counter to busy, indifferent and often judgment officers in a crowded charge office. ... Police officers often subscribe to stereotypes of raped women, and women who do not fit those assumptions have to convince the police that they have been raped=.

⁴Stanton, Lochrenberg & Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 15.

⁵S Ageton **Sexual Assault amongst Adolescents** Lexington: D C Heath & Co, 1983; L Williams >The classic rape: When do victims report?=⁶ (1984) 32(4) **Social Problems** 459.

⁶M Greenberg and R Ruback **After the Crime: Victim Decision Making** New York, Plenum 1992; S Stanton **A Qualitative and Quantitative Analysis of Empirical Data on Violence against Women in Greater Cape Town from 1989 to 1991**, research report prepared for the Human Science Research Council, 1993.

6.3.1 No specific questions were raised in the Issue Paper with regard to the reporting or failure to report cases of suspected child (sexual) abuse to the police and no submissions were received in this regard.

6.4 **Evaluation and recommendation**

6.4.1 In order to encourage victims of sexual violence to report the incident to the police, it is obvious that the public at large should have confidence in the police specifically and in the criminal justice system in general. Victims must have the confidence that their complaints will be taken seriously before they will lay charges with the police. Raising public awareness will lead to an increase in the number of cases reported to the police, provided the system remains responsive to the needs of victims. Training of the police therefore plays a vital role.

6.4.2 **We therefore do not make any recommendations for legislative intervention in this regard.**

6.5 **The reporting of child abuse by certain professionals**

6.5.1 Current South African law provides for the mandatory reporting of the suspected ill-treatment of children⁷ for dentists, medical practitioners, nurses, social workers, teachers, and persons employed by or managing children=s homes, places of care and shelters.⁸ Ill-treatment includes sexual abuse. The obligation is not to report the suspected ill-treatment to the police, but to the Director-General: Social Development. It is also not the victim (the ill-treated child) who is required to report the incident.

⁷Every registered dentist, medical practitioner, nurse or social worker or any other person who examines, attends to or deals with an aged person and suspects that that aged person has been abused or suffers from an injury must immediately notify the Director-General : Social Development in terms of section 6A of the Aged Persons Act 81 of 1967.

⁸In terms of section 42 of the Child Care Act 74 of 1983 and section 4 of the Prevention of Family Violence Act 133 of 1983.

6.5.2 As stated previously, the reporting of the suspected ill-treatment of child abuse is addressed in the investigation on the Review of the Child Care Act.⁹ For the benefit of the reader we include a brief discussion of the issues related to reporting of suspected child abuse, although the Commission will refrain from making any recommendations in this regard in this investigation.

6.6 **Mandatory versus voluntary reporting of child abuse**

6.6.1 At least two basic approaches are to be found in different parts of the world in legislation dealing with the reporting of child abuse. The one approach facilitates voluntary reporting and the second approach makes reporting mandatory and creates legal sanctions for those who fail to do so. South Africa is a proponent of the mandatory approach.

6.6.2 >Mandatory reporting= occurs where a person is obliged by law to report specific forms of abuse to a government authority where that person reasonably suspects that that abuse has occurred.¹⁰ Mandated reporting is a highly debatable and controversial topic, especially given the reality of limited resources and the problem that has been experienced internationally where mandated reporting has been introduced, namely, a drop in standards of care to children at risk and in need of care because of the diversion of funds away from other protective services for children to mandated reporting and follow-up. A further very real problem is that mandated reporting can cause more harm to the child where nothing is done after the report is made.

6.7 **Current South African law**

6.7.1 In terms of section 42(1) of the **Child Care Act** 74 of 1983, reporting suspected ill-treatment of children to the Director-General: Social Development is mandatory for dentists, medical practitioners, nurses, social workers, teachers and

⁹Minutes of the joint meeting of the Project Committees on Sexual Offences and the Review of the Child Care Act held in Durban on 22 October 1999.

¹⁰The Community Law Reform Committee of the Australian Capital Territory **Report No 7: Mandatory Reporting of Child Abuse** Canberra, 1993, p. vi.

persons employed by or managing children=s homes, places of care and shelters. Such >ill-treatment= would include sexual abuse. Failure to report is a criminal offence for those to whom the obligation applies.

6.7.2 In terms of Regulation 39A of the Child Care Act, 1983, notification in terms of section 42(1) of the Child Care Act of suspicious of ill-treatment of or deliberate injury to children and of children suffering from nutritional deficiency diseases must be made in the form of Form 25 or Form 26, as the case may be, and submitted to the Director-General: Social Development. Upon receipt of a notification the Director-General must immediately -

- * request the police, a social worker or an authorised officer to take appropriate steps to ensure the safety and welfare of the child identified in the notification;
- * request a social worker or any other person to conduct a preliminary investigation into the circumstances giving rise to the suspicions described in the notification; and to report back on the steps taken.

6.7.3 Should the preliminary investigation reveal reasonable grounds to believe that a child has been ill-treated or deliberately injured by >an alleged perpetrator whose identity is or may be known=, the Director-General may direct that the alleged perpetrator be removed from any direct contact with children, and that the matter be referred to the police with a view to possible prosecution of that person.¹¹ Whenever an accused is convicted in a criminal court of ill-treatment of a child, or any crime resulting in the deliberate injury on any child, or whenever a children=s court determines that a child is a child in need of care in that the child has been physically, emotionally or sexually abused or ill-treated by a parent, guardian or person in whose custody the child was, the Director-General must be notified.¹²

6.7.4 All notifications of possible ill-treatment of or deliberate injury to children which are transmitted to the Director-General, all convictions for child ill-treatment or

¹¹In terms of Regulation 39A(3)(a) of the **Child Care Act**, 1983.

¹²In terms of Regulations 39A(4)(a) and (b) of the **Child Care Act**, 1983.

deliberate injury to a child¹³ and all determinations of the children=s court as contemplated in Regulation 39A(4)(b) are recorded on a National Child Protection Register.¹⁴

6.7.5 Section 4 of the **Prevention of Family Violence Act** 133 of 1993 also provides for compulsory reporting. It applies to any person who >examines, treats, attends to, advises, instructs or cares for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from injury the probable cause of which was deliberate=. This section was not repealed by the **Domestic Violence Act** 116 of 1998.

6.7.6 Section 4 of the **Prevention of Family Violence Act** 133 of 1993 is a very wide provision and theoretically could apply to all persons in South Africa who may at some time or other >attend to, advise, instruct, or care for any child= in circumstances which ought to give rise to a reasonable suspicion. The fact that the enquiry relates to what a person >ought= to have thought introduces an objective assessment and does not take into account what the person in question honestly thought.

6.7.7 Despite these provisions, problems are continually encountered, many of which appear to be caused by poor infrastructural coherence and lack of co-ordination between protection service providers. These difficulties are summarised as follows in a paper >Legislating for Child Protection= prepared by Drs Loffell and Matthias for the Project Committee on the Review of the Child Care Act:¹⁵

The lack of co-ordination between the reporting provisions of the Child Care Act and the Prevention of Family Violence Act is a source of considerable confusion. All reporters in terms of the Child Care Act are required to send their notifications of cases of suspected abuse to the Director-General of the Department of Welfare on Form 25, as supplied in the amended Regulations to the Act which came into force on 1 April 1998. The Director-General is then required to request a police officer, social worker or authorised officer to take

¹³As contemplated in Regulation 39A(4)(a) of the **Child Care Act**, 1983.

¹⁴In terms of Regulation 39B(1) of the **Child Care Act**, 1983.

¹⁵Pages 37 and 38.

appropriate steps, and to call for an investigation into the circumstances of the case and a report on these circumstances and on action taken, within 30 days. The Director-General may in certain cases instruct that the alleged perpetrator be removed from direct contact with children (presumably where such a person is employed in a children=s facility), and that the matter be referred to the SAPS for possible prosecution [R39A(2) and (3)]. The Prevention of Family Violence Act requires that a report be made to a police official, a commissioner of child welfare or a social worker employed by a registered welfare organisation. The lack until recently of a clear system for reporting cases led to the relevant provisions of both Acts being honoured mainly in the breach.

6.7.8 Despite the legal requirements, the reporting system seems not to be fully functional in much of the country, the Western Cape being a notable exception.¹⁶ Cases of child abuse are of course nevertheless being referred to and dealt with - social workers, police and others have continued to respond to reports according to the directives of their employing bodies.

6.8 Submissions to the Issue Paper

6.8.1 Given that this aspect will be dealt with comprehensively in the investigation into the Review of the Child Care Act, a brief summary of the main points highlighted in the submissions received should suffice.

- * The majority of submissions are in favour of mandatory reporting.¹⁷ However, this support for mandatory reporting was qualified by statements to the effect that there needs to be consensus on the purpose of reporting. Depending on the defined object of mandatory reporting, reporting could serve as the catalyst for child protection measures to kick in or simply serve as a central case register

¹⁶Loffell & Matthias **Legislating for Child Protection** at 38.

¹⁷**Tshwaranang Legal Advocacy Center; S A National Council for Child And Family Welfare** (38 responses); **SAPS Area Commissioner, Legal Services, East Rand; SAPS Child Protection Units, KwaZulu Natal; Ms S Snyman**, Commissioner of Child Welfare, Pretoria; **RP Clinic; Attorney-General, Transvaal; Ms WL Clark; Ms Linda de Rooster**, Forest Town School for Cerebral Palsied Children; **Department of Education; Ms Thuli Madonsela**, Department of Justice; **Gauteng Ministry of Safety and Security**. Some respondents are of the view that reporting should be voluntary (**Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government**) while others say it should be both mandatory and voluntary: **Association for Persons with Physical Disabilities, Northern Cape**.

useful for policy making, the monitoring of the occurrence of abuse and / or to plan (and hopefully budget for) services for the children involved. In this context the point is forcefully made that should reporting be mandated, this obligation needs to be backed by the necessary service infrastructure.¹⁸ Where the system fails to respond to the report, the child's vulnerability may be increased. Other respondents argue that the problem of enforcement is impossible to solve entirely, but that does not mean that the failure to report should not be a criminal offence.

- * The majority of respondents are of the opinion that the obligation to report must at least cover all professionals (doctors, nurses, teachers, social workers, etc.) in the front line of child care,¹⁹ while others argue that the obligation should be extended to all members of civil society. However, some respondents adopt a more restrictive approach and specifically exclude neighbours from the category of mandated reporters.²⁰
- * The majority of respondents agree that all who report abuse in good faith should be indemnified from legal action.²¹ It is also suggested that the identity of reporters of abuse be kept secret to protect them from intimidation or vengeful acts.
- * As to whom the report should be made, respondents appear to be equally divided amongst the police and welfare organisations,²² with some support for the Department of Social Development (Welfare) and Commissioners of Child

¹⁸Johannesburg Child Welfare Society.

¹⁹S A National Council for Child and Family Welfare; R P Clinic; Association for Persons with Physical Disabilities, Northern Cape; Attorney-General, Transvaal; Ms W L Clark; Department of Education; Ms Thuli Madonsela, Department of Justice.

²⁰Adv R Songoa, University of the North.

²¹Association for Persons with Physical Disability, Northern Cape; Tshwaranang Legal Advocacy Center; S A National Council for Child and Family Welfare (37 responses); SAPS Area Commissioner, Legal Services, East Rand; SAPS Child Protection Units, KwaZulu Natal; RP Clinic; Attorney-General, Transvaal; Ms W L Clark; Department of Education; Ms Thuli Madonsela, Department of Justice.

²²S A National Council for Child and Family Welfare; SAPS Child Protection Units, KwaZulu Natal; Adv R Songoa, University of the North; RP Clinic; Association for Persons with Physical Disability, Northern Cape; Ms W L Clark.

Welfare.

6.8.2 **Mr Neil van Dokkum**,²³ in a well motivated submission, highlights another potential problem with mandatory reporting. He says there is always a danger that mandatory reporting will tend to skew already prejudiced public opinion against those people who find themselves in a disadvantaged socio-economic position. He continues:

Characteristics frequently identified with the >battered child syndrome=, such as social isolation, alcoholism, unemployment, childhood disability, large family size, low level of parental educational achievement, and acceptance of severe physical punishment as a childhood socialising technique, are associated with social marginality and poverty. In addition, health professionals in public hospitals are far more likely to see and report child abuse than those that are in private practice. As poorer people cannot afford private practitioners and are forced to use the public or state hospitals, they have much greater social visibility where child abuse is concerned than people of means.

Resulting statistics therefore create the skewed impression that child abuse is an evil of the lower socio-economic strata.

This impression can be strengthened where the definitions of abuse or maltreatment are vague and judgmental and which tend to reinforce existing prejudices against different race groups, alternative lifestyles, single parents and low-income groups. This perception can only be cured by the health professional adopting a pro-active attitude to the detection of child abuse which must be clearly and objectively defined by statute.

This raises the problem of parents avoiding taking their children for medical treatment for fear of detection and prosecution. The objection that compulsory reporting will deter parents and guardians from presenting their children for medical attention has always been criticised as more intuitive than empirical. The claim that mandatory reporting legislation would be counterproductive has never before been proven by statistics in a field where statistics abound. ... Instances of parents withholding treatment will obviously occur, although with what frequency it is impossible to estimate. It can be argued that on balance, mandatory reporting provides a considerable social gain. It will spur some reporting. It protects physicians and reminds them of their professional obligation to assist children in trouble.

...

To conclude, it is submitted that what is required is legislation that effectively

²³See also N van Dokkum >The statutory obligation to report child abuse and neglect= 1996 **Acta Juridica** 163 - 179.

compels reporting of child abuse and neglect, but at the same time makes it clear that such reporting is aimed at the detection of children in need of care, rather than the necessary apprehension and conviction of the perpetrators (whether by commission or omission) of that abuse or neglect.

6.9 Evaluation and recommendation

6.9.1 As stated previously,²⁴ the Commission's investigation into the Review of the Child Care Act will cover the aspect of reporting child abuse. However, from the submissions it is clear that the issue of reporting the suspected ill-treatment of children is complex and not without its difficulties.²⁵ The reasons why certain professionals and persons are obliged to report the suspected abuse of children need to be clearly defined and once a statutory duty to report is imposed, services to that child in need should at least follow the report. It hardly helps child victims when reports of their suspected ill-treatment are filed away for statistical or record-keeping purposes.

6.9.2 Therefore, if addressing child sexual abuse is to be seen as part of the provision of services for children in need, as we believe it should, referral into the child protection system should follow after a report of suspected ill-treatment has been made. This report may include an initial assessment of the needs of the child and the family. After this initial assessment, while it may be clear that many cases should not be treated as criminal / protection cases, it will be apparent that some should be. In other cases further enquiries will be necessary before deciding which route is in the best interest of the child.

6.9.3 The Commission would, however, like to highlight the anomaly pertaining to non-reporting of illegal sexual activity with minors which is being justified in terms of the **Termination of Pregnancy Act 92 of 1996**. This Act entitles a woman (of any age, including a child) to terminate a pregnancy upon her request and her consent alone.

²⁴See paragraph 6.1.2 above.

²⁵One of the difficult issues to be resolved follows the question under what circumstances should a professional or a person mandated to report cases of suspected ill-treatment to an appropriate professional body or the Department of Welfare be obliged also to report the matter to the police.

Section 7 of this Act guarantees that the identity of such a woman will be kept in confidence. Some medical practitioners are said to be performing terminations of pregnancy on young women who are under the legal age of consent to sexual intercourse. The pregnancy is clearly evidence of this activity and as such should be reported to the appropriate authorities. The medical practitioners are faced with seemingly conflicting obligations, i.e. an obligation to report child abuse and an obligation to keep the identity of women seeking terminations of pregnancy in confidence. The Commission suggests that in applying the axiom that all decisions should be made in the best interests of the child, a medical practitioner is obliged to report the incident in terms of section 42 of the **Child Care Act**, 1983, where a girl under 16 years of age decides to terminate her pregnancy. The reporting of the abuse in no ways affects the choice, if it is an informed choice, by the child to terminate the pregnancy.

6.9.4 **Pending finalisation of the investigation into the Review of the Child Care Act, we refrain from making any recommendations on the reporting of suspected child ill-treatment by certain professionals and other persons.**

CHAPTER 7

POST EXPOSURE PROPHYLAXIS FOLLOWING A SEXUAL OFFENCE¹

7.1 Introduction

7.1.1 Given the extent of the HIV/AIDS pandemic in South Africa, one of the first issues to be decided by a victim of sexual violence is whether he or she is going to request some kind of post exposure treatment.² This Chapter therefore deals with the provision of >Post Exposure Prophylaxis= (PEP) to victims of sexual violence in incidences where there is the possibility of HIV/AIDS transmission. PEP is a type of preventive antiviral therapy for human immunodeficiency virus (HIV) that is designed to reduce (but not eliminate) the possibility of infection with the virus after a known exposure.³

7.1.2 In considering whether to use PEP, time is of the essence for the victim. In order for the PEP treatment to be effective the drugs must be taken for 28 days after exposure to HIV. Studies have shown that PEP may not be effective after 24 to 36 hours, and the Centers for Disease Control and Prevention in the United States therefore recommends starting PEP within 2 hours of exposure. However, this agency also recommends PEP for some individuals presenting 36 hours or more after exposure.⁴

¹This Chapter is based to a large extent on Chapter 15 of the Discussion Document **Legal Aspects of Rape in South Africa** (30 April 1999).

²The request for post exposure treatment implies prior knowledge of the availability of treatment options and the dangers of HIV/AIDS transmission on the part of the victim. This is not necessary a valid assumption in the South African context.

³Rick Sowadsky >MSPH Post-Exposure Prophylaxis (PEP) For Sexual Exposures= (June 1998) Website: www.thebody.com/plaintant/cgi/safeans.html. The treatment is comprised of -

- AZT (also known as *Retrovir* and *Zidovudine*),
- 3TC (also known as *Lamivudine*); and
- *Crixivan* (also known as *Indinavir*).

The addition of 3TC and *Crixivan* to AZT is recommended in high risk exposures. This is known as 'triple therapy'.

⁴Centers for Disease Control and Prevention >Update: Provisional Public Health Service

7.1.3 It should be clear that not all sexual offences (such as fondling or indecent exposure) pose the risk of HIV/AIDS transmission. The provision of PEP should therefore be limited to those instances where there is a serious risk of HIV/AIDS transmission.⁵ Because of the cost implications, we would argue that the provision of PEP at state expense be restricted to those incidences we now define as >rape=.

7.1.4 Victims of sexual violence often also demand to know the HIV/AIDS status of the person(s) accused of committing the act. This aspect is dealt with in Annexure A to this discussion paper.

7.2 Current position in South Africa

7.2.1 The drugs required for PEP treatment are available in South Africa, but are not readily accessible to most people. Although the drugs are available at some state hospitals, few district surgeons and even fewer private medical practitioners have them.

7.2.2 The health care of sexual offence victims is generally problematic in South Africa.⁶ The practice of district surgeons and other medical personnel is inconsistent and therefore unreliable in relation to medical examination and treatment of the sexual offence victim. District surgeons are required to collect forensic evidence from the victim. They are under no obligation to provide victims with -

- prophylactic treatment for sexually transmitted diseases [STD=s];
- the 'morning after pill' to prevent possible pregnancy; or
- medical treatment of injuries sustained as a result of the sexual offence.

recommendations for chemoprophylaxis after occupational exposure to HIV=(1996) 45 **MMWR** at 468 - 472.

⁵We do realise, however, that there is a danger that some persons might claim to have been >raped= or >sexually assaulted= in order to qualify for the free supply of the PEP drugs to victims of sexual assault as we would like to propose.

⁶See Chapter 3 for a further discussion on this point.

7.2.3 Moreover they often fail to inform victims of the possibility of STD infection (including HIV) and where applicable, pregnancy (which would have enabled these victims to seek further medical assistance and advice). Although some district surgeons do provide these services, the majority do not. In addition many victims who have been sexually violated have to wait long periods of time (sometimes up to 36 hours) before a district surgeon will examine them.

7.2.4 The result of this is that many complainants who are at risk of HIV infection are not informed-

- of the possibility of HIV infection after the act of sexual violation;
- about the existence of PEP treatment; or
- how and where to access the drugs should they choose to take them.

7.2.5 Should a complainant be aware of the risk of HIV infection and wish to take PEP treatment, he or she has to find and pay for the drugs him or herself.⁷ However, it is standard practice for the state to provide PEP to state employees who incur occupational injuries and are exposed to HIV in the course of their professional duties, for example, a medical doctor who incurs a needle stick injury while operating on a known HIV positive patient. This treatment is at the state's expense.

7.2.6 The *Rape Management Protocol* which has been operational at Grootte Schuur Hospital in Cape Town provides for the following:⁸

- Women who have been raped and who present within 48 - 72 hours of being raped are provided with AZT.
- Grootte Schuur Hospital (which is a state hospital) bears the cost of the AZT

⁷In April 1999, the drugs costed R663,68 for AZT; R912,00 for 3TC; and R2 195,00 for *Crixivan* (Glaxco Wellcome).

⁸Personal communication with Dr. Lynette Denny (Head of Department of Obstetrics and Gynaecology, University of Cape Town) on 26 April 1999. She added that triple therapy is not offered to rape victims because there is as yet no data to indicate that additional anti-retroviral drugs enhance the protective effect of AZT.

treatment should the woman not be able to afford it.

- Each woman is informed of the risks of HIV transmission and is offered an HIV test.
- AZT is given for one month after the rape.
- In addition to receiving PEP, women are routinely treated for other STDs (eg syphilis, chlamydia, gonorrhoea) and are given 'the morning after pill' where appropriate.
- Women are followed up in the outpatient division to monitor side-effects to medication, including AZT.
- Each rape victim is assessed individually by a gynaecology registrar and her case is discussed with the hospital HIV expert, who authorises the use of AZT.
- AZT is available 24 hours a day to ensure that treatment is started immediately.

7.3 Current position in other jurisdictions

7.3.1 In the developed world with its well established health care systems, victims of sexual violence can receive the best of treatment at state expense. This does include the provision of PEP.⁹ However, given the scope of the HIV/AIDS pandemic in South Africa (and in Africa in general), the lack of resources and the constraints on the health care systems in developing countries, etc., it seems unwise to compare our position with that of the United States of America or Sweden, for example.

⁹In the United States the health care system is restricted from charging rape complainants for services necessitated as a result of the rape. Therefore, if PEP is offered and taken by the rape complainant, the local health care system must bear the costs of the medication. In San Francisco the local health department pays for the medications, while in New York the State AIDS Office has mandated the local health department to pay for the medication. In France, the state-funded health care system pays for the cost of PEP medication for either rape or consensual sexual exposure.

7.3.2 We could not find any comparative legislative examples in the African context where PEP is offered to victims of sexual violence.¹⁰ Indeed, a recurring theme in Africa is the lack of resources and skilled personnel.¹¹

7.4 Evaluation

7.4.1 The medical imperative for provision of PEP

7.4.1.1 Currently PEP is used primarily for the prevention of infection in cases where there has been a known high risk occupational exposure. This practice is based on evidence that anti-retroviral treatment prevents HIV infection after occupational exposure, for example, in the case of needle stick injuries incurred by health care workers.¹² Evidence of the efficacy of PEP in occupational settings is based on a multi-centre case-control study of health care workers.¹³ This study showed that there was a 79% reduction in the odds of infection for those workers who had received PEP.

7.4.1.2 More recently Cardo et al¹⁴ published the results of a second retrospective case control study that showed an 81% reduction in odds of seroconversion for health care workers who took AZT following occupational exposures compared to those who did not. Based on the first study referred to above, the Centers for Disease Control and Prevention produced its current guidelines for occupational PEP.¹⁵

7.4.1.3 It has been argued that if the risk of HIV transmission and thus infection

¹⁰See also par 9.30 of the 4th Interim Report in the investigation into Aspects of the Law relating to AIDS (Project 85): Compulsory HIV Testing of Persons arrested in Sexual Offence Cases (December 2000).

¹¹See Uganda Law Reform Commission **A Study Report on Rape, Defilement and Other Sexual Offences** (April 2000), p. 134.

¹²Centers for Disease Control and Prevention >Case-control study of HIV seroconversion in health-care workers after percutaneous exposure to HIV-infected blood= (1995) 44 **MMWR** 929 - 933.

¹³Ibid.

¹⁴DM Cardo et al >A case-control study of HIV seroconversion in health care workers after percutaneous exposure= (1997) **New England Journal of Medicine** 1485 - 1490.

¹⁵Centers for Disease Control and Prevention (1996) 45 **MMWR** 468 - 472.

through certain sexual practices is of the same order of magnitude as those occupational exposures, PEP would seem to be appropriate for people after sexual exposures.¹⁶ There is currently no direct evidence showing that PEP treatment prevents infection after sexual exposure, and it is unlikely that this evidence will become available. This is largely as a result of the ethical objections to a placebo-controlled trial, and also to the fact that in order to conduct this research, large sample sizes would be required.¹⁷

7.4.1.4 However, many experts maintain that PEP treatment preventing infection after sexual exposure is biologically plausible, given the efficacy of treatment after transcutaneous occupational exposure and the similarities between immune responses to transcutaneous and transmucosal exposures.¹⁸ (By *transcutaneous* we mean >through the skin >and by *transmucosal* we mean >through a mucus membrane=, for example, the mucus membrane of the vagina.)

7.4.1.5 In addition to this, researchers from a number of centres maintain that by using the best available epidemiologic information, clinicians can estimate the risk (probability) of HIV transmission for any given exposure and compare it with risks for which the CDC recommends occupation-related PEP.¹⁹ More recently PEP following sexual and drug exposures has also been recommended by researchers from the Department of Public Health, San Francisco, the Department of Medicine, University of California, UCSF/SFGH Epidemiology and Prevention Interventions and the San Francisco General Hospital, University of California, San Francisco.²⁰

¹⁶MH Katz & JL Gerberding >Postexposure treatment of people exposed to human immunodeficiency virus through sexual contact or injection use= (1997) **New England Journal of Medicine** 1097-1100.

¹⁷P Lurie et al 'Postexposure Prophylaxis After Nonoccupational HIV Exposure' (1998) 280 **Journal of the American Medical Association** 1769-1773.

¹⁸IA Spira et al >Cellular targets of infection and route of viral dissemination after an intravaginal inoculation of simian immunodeficiency virus into rhesus macaques= (1996) **Journal Exp Med** 215 - 225.

¹⁹Lurie et al (1998) 280 **Journal of the American Medical Association** 1769.

²⁰Joshua Bamberger et al >HIV Postexposure Prophylaxis Following Sexual Assault= (1999) **American Journal of Medicine**.

7.4.1.6 Lurie et al²¹ state that establishing the probability of HIV transmission is dependent on three factors-

- the frequency of exposure;
- the probability that the source is HIV positive; and
- the probability of transmission if the source is infected.

7.4.1.7 They base their recommendations for PEP after sexual exposure on the CDC's recommendations from extrapolated data on the benefits of PEP after occupational exposure.

7.4.1.8 Based on the above arguments that the information on the effectiveness of PEP in occupational settings should be extended to sexual exposure, this would obviously include non-consensual sexual assault. It is well documented that male to female transmission of HIV is very efficient in consensual sex,²² although the risk of transmission is highly variable, with some individuals becoming infected after one sexual exposure and others remaining uninfected after multiple sexual exposures.

7.4.1.9 A number of factors indicate that the risk or probability of transmission of HIV in cases of non-consensual sexual assault is even higher than in consensual sex. These factors may include -

- the number of times a person is sexually violated (raped) (either by multiple perpetrators or by one perpetrator violating the victim repeatedly);
- the fact that the vagina or anus may not lubricate making penetration likely to cause injury; and
- the fact that force may have been used in the act of sexual violence which may

²¹Lurie et al (1998) 280 **Journal of the American Medical Association** 1770.

²²A Van der Straten et al >Couple communication, sexual coercion and HIV risk reduction in Kigali, Rwanda= (1995) **AIDS** 935 - 944.

cause injury.

7.4.1.10 Lurie et al²³ acknowledge that the risk of HIV transmission in cases of non-consensual sexual assault may be greater than from consensual sex because of genital and rectal trauma and bleeding, exposure to multiple assailants or exposure through multiple receptive sites. They accordingly recommend PEP to all victims of rape. Bamberger et al²⁴ also state that rape may increase the risk of HIV infection compared to consensual sex for two reasons. Firstly, trauma is more likely in the case of rape, and secondly STDs causing genital lesions may be more prevalent.

7.4.1.11 As has been stated earlier, immediate PEP treatment is vital for it to be effective. Katz and Gerberding²⁵ as well as Lurie et al²⁶ recommend that PEP treatment should be initiated within a few hours of exposure, with a cut-off point at 72 hours.

7.4.1.12 In May 1994 the Working Group on HIV Testing, Counselling and Prophylaxis after Sexual Assault in the United States published proposals for the development of policies and principles of clinical intervention in the care of rape victims.²⁷ They believe that the decision to take PEP after a rape should be based on a risk assessment of the exposure. This assessment should consider-

- available information of the HIV status of the accused rapist;
- type of exposure (anal, vaginal or oral penetration and ejaculation);
- nature of the physical injuries; and
- the number of times the victim was raped.

7.4.1.13 It should be noted that in the majority of cases, information about the HIV status of the accused is unavailable. This is because at the time when a victim may

²³Lurie et al (1998) 280 **Journal of the American Medical Association** 1771.

²⁴Bamberger et al (1999) **American Journal of Medicine**.

²⁵Katz et al (1997) **New England Journal of Medicine** 1097-1100.

²⁶Lurie et al (1998) 280 **Journal of the American Medical Association** 1771.

²⁷LO Gostin et al >Working Group HIV Testing, Counselling and Prophylaxis After Sexual Assault=
(1994) **Journal of the American Medical Association** 1436-1444.

present for medical care, the perpetrator will not have been apprehended. Therefore each case must be assessed by considering the other three factors.

7.4.1.14 While it is useful to draw on international protocols (mainly in the United States and Canada) in deciding whether PEP is appropriate in a specific case, one should be mindful that the HIV/AIDS situation in South Africa is very different to that in many developed countries. In the United States, for example, the prevalence of HIV in the general population is about 1% and therefore presumably the same in rapists.²⁸

7.4.1.15 This is very different in South Africa. According to Dr Helen Rees,²⁹ it can be assumed that 20% of male rapists are HIV positive using adult rates of infection. She holds the same opinion as Lurie et al, saying that rape is more likely to result in trauma than consensual sex and this predisposes the victim to HIV infection. She adds that South Africa has very high rates of STDs in sexually active populations. STDs predispose to HIV infection and are therefore another risk factor for seroconversion after rape. It is also a fair assumption that sexual offenders may have a higher profile in relation to sexually irresponsible behaviour.

7.4.1.16 Dr Rees believes that noting all these factors, victims in South Africa are at greater risk of becoming infected with HIV than, for example, victims in the United States. Even though she concedes that we cannot presently quantify that risk and that there is no clear evidence that PEP treatment given to health care providers after needle stick injury would apply to victims who have been raped, she recommends triple therapy (*AZT*, *3TC* and *Crixivan*) for one month after the rape, based on the knowledge available on occupational exposure.³⁰

7.4.1.17 **South Africa is a country of limited resources, and the provisions of PEP to rape victims has accordingly become a contentious issue. It is**

²⁸Bamberger (1999) *American Journal of Medicine* ??.

²⁹Director, Reproductive Health Research Unit, Department of Obstetrics and Gynaecology, Chris Hani Baragwanath Hospital.

³⁰Helen Rees, Communication on the Reproductive Health Discussion Group (6 October 1998) Website: repro_1@healthlink.org.za .

acknowledged that the cost implications of providing all victims of sexual violence with PEP treatment would be extremely high. However the cost of not providing PEP will assuredly be much higher and will affect the public health care system and have a ripple effect on the economy. The exact impact of non-provision of PEP is difficult to quantify but will nevertheless be profound. The Commission holds the opinion that it is the responsibility of the state to provide the financial means to cover the cost of PEP for victims of sexual violence as these complainants have been exposed to a life threatening disease through no choice of their own. The State=s obligation to prevent further harm is currently before the High Court in the Carmichele³¹ case.

7.5 Recommendations

7.5.1 We recommend the enactment of legislation to provide that in sexual offence cases -

- All victims of rape³² should receive HIV testing, the best possible medical care, treatment, and counselling.
- As it is the duty of the state to protect its citizens, the state should cover all costs for treatment and counselling required by the victim of a rape as a result of the assault, including the provision of PEP, HIV-antibody testing and counselling.

7.5.2 Accordingly we recommend that the following provisions be included in the new Sexual Offences Act:

Provision of treatment

³¹**Carmichele v Minister of Safety and Security and another** CCT48/00 heard on the 16th August 2001 in the Constitutional Court of South Africa.

³²This provision must be confined to >rape= victims as per our new definition (penetrative offences) and should not apply to victims of sexual offences in general.

xx. (1) If it has been established that a person has sustained physical or psychological injuries as the result of a sexual offence, such person shall, as soon as is practicable after the offence, receive adequate medical care, treatment, and counselling as may be required for such injuries.

(2) The State shall bear the cost of the medical care, treatment and counselling as referred to in subsection (1).

7.5.3 We further recommend that the Department of Health, in consultation with other sectors should develop and implement binding protocols for medical practitioners and health care professionals as to the appropriate steps to be taken when victims of rape present themselves for treatment. Such protocols should provide that :

- (1) Appropriate measures be taken to protect the privacy and dignity of victims presenting themselves at a hospital following a sexual offence and that measures be taken to expedite the proceedings.**
- (2) All victims of rape must be examined and assessed as to the risk of HIV infection by a district surgeon, medical practitioner or health care professional immediately after reporting the assault to the police. Victims who do not report the sexual assault to the police but present at a medical facility must be examined and assessed by a medical practitioner or health care professional immediately after presenting.**
- (c) All victims of rape who present at a medical facility (including those who are examined by a district surgeon) must be informed by the medical practitioner or health care professional of the risk of being HIV infected as a result of the sexual assault.**
- (d) All victims of rape must be individually assessed as to the risk of HIV infection,**

taking into consideration -

- . available information on the HIV status of the perpetrator;
- . the type of exposure;
- . the nature of the physical injuries; and
- . the number of times the victim was sexually assaulted.

(e) All victims of rape must be informed after assessment of the risk of HIV infection in their particular case and a recommendation must be made to them whether PEP treatment is appropriate. Regardless of the recommendation of the medical practitioner or health care professional, the choice of whether to take PEP or not remains that of the victim.

(f) All victims of a rape must be informed of -

- the existence of PEP drugs;
- the purpose of the drugs; and
- the possible side effects of the drugs.
- the consequences of not taking the drugs.

(7) PEP drugs ought to be available at all medical facilities. Should the drugs not be available at the medical facility where the victim presents, the victim must be assisted by the medical facility, the attending medical practitioner or the health care professional in obtaining the drugs.

CHAPTER 8

POLICE INVESTIGATION

8.1 Introduction

8.1.1 This Chapter deals with the process once a victim of a sexual offences presents himself or herself at the police¹ in order to lay a charge. In line with our victim orientation, the Chapter will make recommendations on the way the police should handle complaints of a sexual nature. Attention will also be given to the role of identity parades and the compulsory HIV testing of persons arrested in sexual offence cases. The task of the police to prevent crime, to effect the arrest of persons accused of committing sexual offences, and the interrogation of such persons,² will not be discussed per se as we will assume that the police will apprehend and interrogate the suspect in order for the matter to proceed to trial.

8.1.2 It will be recalled that the Commission has recommended³ that a joint investigative team conduct the criminal investigation of all >serious sexual offence cases=.⁴ We contended that this team should be comprised of trained and specialised police officers and prosecutors and that the team should be supervised by a prosecutor. We also stated that this team could be expanded by the inclusion of other professionals if and when needed. In the case of serious sexual offences the police investigation should, in our opinion, be conducted by this prosecutor driven team. Pending formation of such joint investigative teams and to cater for those sexual offences not listed in Schedule 6 of the Criminal Procedure Act 51 of 1977, much can however be done in the interim to improve the quality of the police investigation. It is with this in mind, that we approach this Chapter.

¹See also Chapter 3 for a discussion of the police as one of the key agencies involved.

²See Harding et al **Criminal Justice in Europe** 227 for a comparative review of the police interrogation process in the Netherlands and England and Wales.

³See par 4.6.2 above.

⁴The Schedule 6 of the Criminal Procedure Act 51 of 1977 cases.

8.2 The police and victims of sexual offences

8.2.1 In this Chapter we proceed from the basis that the victim of the sexual offence has decided to report the matter to the police. Because the police will usually be the victim=s first point of contact with the criminal justice system, it is especially important that the SAPS treats sexual assault victims in a sympathetic and supportive manner. Failure to do so not only compounds the trauma experienced by victims, but may discourage them from taking further action and deter other sexual assault victims from reporting to the police.

8.2.2 Over recent years, considerable efforts have been made to improve police practices and procedures in relation to sexual offence victims. Measures taken include the issuing of National Instructions, modification of police Standing Orders, increased training, the formulation and implementation of guidelines governing the handling of sexual offence cases, and the development of an enhanced role for the Child Protection Units (now called FCS Units). Consistent with these developments, some studies speak positively of the experiences of victims with the police.

8.2.3 Despite these major gains that have been achieved, several problem areas remain. A common complaint of victims is that the needs of victims often take second place to investigative and administrative priorities. Victims say the police conduct the investigation process in a way that seems to be designed to suit the police rather than the victim and this causes victims to feel as if they are merely pieces of evidence. Similarly, it is evident that some police members continue to treat victims of sexual violence with disbelief, especially where consent is the major issue, and that some victims have been actively discouraged from proceeding with reports. Another serious complaint is that the most basic of services that ought to be provided by the police are rarely made available. As Bollen, Artz, Vetten and Louw⁵ have said:

Thus, although the general *attitude* of police officials towards survivors of violence appears satisfactory, the same cannot be said of their *effectiveness* with

⁵**Violence against Women In Metropolitan South Africa** (ISS Monograph Series No 41), p. 54 (emphasis in the original).

regard to standard police work.

8.2.4 Although the Bollen et al study did not investigate the reasons for this lack of service, it is speculated that the failure to take photographs, to assist victims in a private room and to transport them to the district surgeon may have been due to a lack of resources and infrastructure at the police station, rather than an unwillingness on the part of the police to help.⁶

8.2.5 In general, however, there is a need to-

- * reduce the filtering out of cases at police station level;
- * combat police corruption;
- * improve police procedures for taking statements from victims;
- * ensure that the police, along with the Office of the Director of Public Prosecutions, provide more information to victims;
- * reduce delays in organising medical examinations of victims.

These aspects will be dealt with seriatim.

8.3 The registration >filter=

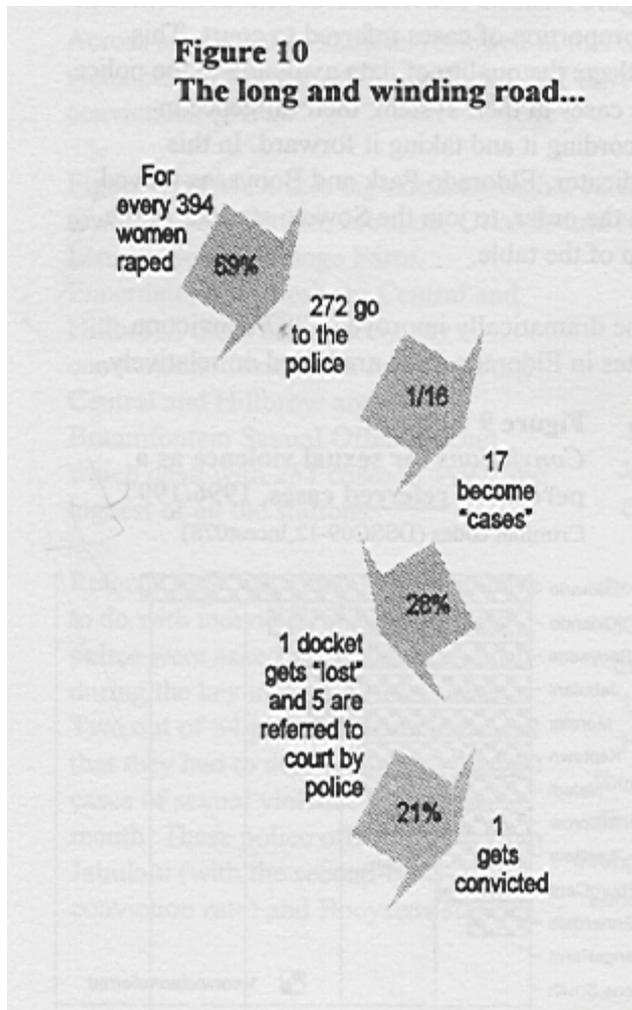
8.3.1 While there is a perception that victims of sexual violence do not go to the police,⁷ recent studies⁸ suggest that what is in fact occurring is that cases are filtered - a large number of victims might take their case to the police, while only a small number is actually registered as cases of sexual violence. The filtering takes place between arrival of the victim at the police station and what, perhaps minutes later, is called a case. This is a point of non-accountability that requires urgent attention.

⁶See also the CIETafrica study, p. 18 - 19.

⁷See paragraphs 6.2.1 above for a discussion of the low reporting rate of incidents of sexual violence and the reasons for this.

⁸CIETafrica **Prevention of sexual violence**, p10; Bollen, Artz, Vetten and Louw **Violence against Women in Metropolitan South Africa**, p. 55. See also Law Reform Commission of Victoria **Appendixes to Interim Report No. 42: Rape: Reform of Law and Procedure** (July 1991) p. 41.

8.3.2 This point is clearly illustrated in the CIETafrica report:⁹



⁹Prevention of sexual violence, p. 10.

8.3.3 This figure depicts the filtration of cases from rape through to conviction. For a variety of reasons, including fear or lack of confidence in the system, not all victims who are raped go to the police. Among those 60 - 70% who do go to the police, not all - an estimated one in 15 across the Southern Metropolitan Local Council area - is called a rape case and a docket opened. CIETafrica continues:¹⁰

Some may be labelled as something else (indecent assault or domestic violence). The victim may decide, or may be persuaded, to drop the case. For one in roughly 20, the docket will be lost in a manner they consider fraudulent. Of every 17 dockets that are opened, five will be referred by the police. Of these, one will be convicted. This implies the average rapist in the South has less chance of conviction than he has birthdays in a full year.

8.3.4 From the official police records, there are several clues that help explain the gap between the number of victims who take their cases to the police and those who appear in the records of the police stations. As the CIETafrica study points out, in Booyens, Johannesburg, for example, many more reports of >indecent assault= are recorded in comparison with >rape and attempted rape=. This suggests a station-to-station variability in the filtration process, a variable gap in the number who take their case to the police, and the number the police consider as cases.

8.3.5 The CIETafrica study also offer other reasons for filtering cases at the point of registration. For example, some police officers commented on >>false reporting= by some victims as a form of corruption, a means to extort from the accused. Whatever its causes, the registration filter of such variable dimensions between police stations makes it extremely difficult to monitor police performance in managing cases of sexual violence. >Looking at it one way, the more cases that are filtered out and ignored before registration as a rape case, the more chance the few residual cases each have of being brought successfully to trial. The more selective police are in filtering out cases, viewed superficially, the better their statistics look. Police are aware of the performance comparisons that are based on the [SAPS] CMIC¹¹ data and, in part

¹⁰CIETafrica **Prevention of Sexual Violence : A Social Audit of the Role of the Police in the Jurisdiction of Johannesburg=s Southern Metropolitan Local Council** (October 1998), p. 14.

¹¹Crime Management Information Centre.

understandably, might opt to make their Astatistics@ as positive as possible=.¹²

8.3.6 As police performance improves, however, and is recognised to improve - even if the actual occurrence of sexual violence declines - more victims will bring their cases to the police, many more will be registered and there will probably be an explosive >increase= in the number of registered cases. The way out of this is to complement the institutional monitoring with community based monitoring and to have a comprehensive management of expectations of communities and press in this respect.

8.4 The decision not to proceed with the police investigation

8.4.1 The initial decision whether to proceed with the investigation of a sexual offence case is made by the police. In most cases the police exercise substantial discretion, and unlike judicial officers, do this almost invisibly. Police decide whether a case is founded or unfounded and whether and how to investigate - decisions which affect the quality of evidence available for trial. In 1993 for example, of the 562 rape cases reported to Khayelitsha, Gugulethu and Nyanga police stations in Cape Town, 47% (261) were classified as unfounded / withdrawn / no arrest made. The decision to >unfound= is wide and may vary from reasons such as that the incident took place outside of that jurisdiction,¹³ to the police not believing the victim, to reluctance to pass on what are perceived to be >real= cases that will not stand up at subsequent stages (such as cases involving no physical injury, a delay in reporting or inability to clearly identify suspects), to victims themselves not wanting to pursue the case. No South African study has, however, examined the factors which may influence the unfounding of cases.¹⁴

8.4.2 On the other hand, some victims also approach the police after the initial reporting stage to withdraw charges. In the worst case scenario, the victim is not even

¹²CIETafrica, p. 17.

¹³Despite the clear provisions of the **SAPS National Instruction 22 / 1998 on Sexual Offences**, par 3.(2)(a) in this regard.

¹⁴Stanton, Lochrenberg & Mukasa **Improved Justice for Survivors of Sexual Violence?**, p. 17.

involved in this process as the parents / care-givers come to an arrangement with the alleged offender on the payment of compensation.¹⁵ A statement is then filed on the police docket stating that the victim no longer wishes the criminal investigation to proceed.¹⁶ Strictly speaking, even though a victim wishes to withdraw charges (and therefore does not require further police action), the police remain under an obligation to investigate the report and prosecute the offender if he or she is located. The police or the Director of Public Prosecutions also retain the right to subpoena a victim in such a case to give evidence at any resultant proceedings. In practice, this power is exercised reluctantly, because an unwilling complainant is unlikely to assist in achieving a successful prosecution.

8.4.3 Some members of the police feel that the request by the victim to have charges withdrawn compromise their position. If a prosecution is initiated after such a statement has been made, the police risk being accused of forcing the victim to become involved against his or her stated wishes. On the other hand, if the matter is not investigated and further allegations are made against the same suspect, the police are likely to be criticised for not acting sooner to protect the community.

8.4.4 The SAPS **National Instruction 22 / 1998 on Sexual Offences: Support to Victims and Crucial Aspects of the Investigation** gives no guidance to members of the police as to when a case is to be regarded as >unfounded= or what to do when a victim wishes to withdraw the charge. The SAPS **National Instruction 7 / 1999 on Domestic Violence**, on the other hand, does provide that police members are obliged to open a docket and to have it registered for investigation. In cases of domestic violence, the SAPS member >may not avoid doing so by directing the complainant to counselling or conciliation services=.¹⁷ The police must also fully document their responses to every incident of domestic violence on a specific form regardless of

¹⁵This is a serious concern as it shows that whole communities sometimes prefer not to use the formal legal system.

¹⁶In Victoria, Australia these statements are called >No further action statements=. See also Law Reform Commission of Victoria **Report No 46: Rape: Reform of Law and Procedure: Supplementary Issues** (July 1992), p. 29.

¹⁷Paragraph 7(1) of the National Instruction 7 / 1999: Domestic Violence.

whether or not a criminal offence has been committed.¹⁸ Failure to comply with an obligation imposed in terms of the Act or the National Instruction constitutes misconduct.

8.4.5 It is recommended that the police should review procedures for recording and following up >unfounded= cases and cases where the victim wishes to withdraw the matter. Once these procedures have been settled, they should be incorporated into the National Instruction on Sexual Offences. It is also recommended that the Sexual Offence Act should place a positive obligation on the police to accept and register all complaints of sexual offences.¹⁹

8.4.6 The Commission also concludes that it might not be in the public interest in particular cases to withdraw sexual offence charges even when requested to do so by the victim, especially in those instances involving intra-familial abuse. Clearly, it is not in the public interest to withdraw charges willy-nilly in such cases, even if the victim or the victim=s other parent asks for it to be done. In some instances, the greater public good and the duty of the State to protect all its citizens against crime override the individual concerns or wishes of the immediate victim.

8.4.7 We therefore recommend that the police should not have a discretion as to whether or not to proceed with an investigation even when requested not to proceed by the victim. The sole discretion not to proceed with an investigation should be that of the prosecuting authority. To give effect to this recommendation, the SAPS National Instruction on Sexual Offences should clearly spell out that all sexual offence cases must be investigated fully, that charges may not be withdrawn at police station level even when requested to do so by the victim or the victim=s family, and that any decision not to proceed with a police investigation falls with the relevant prosecuting authority.

8.5 Dealing with >>false reports=

¹⁸Paragraph 12(2) of the National Instruction 7 / 1999: Domestic Violence.

¹⁹See paragraph 8.5.5 below.

8.5.1 An issue of considerable concern to service providers, activists in this field and the police is that of so-called >>false reports= by victims. According to service providers and activists, many cases of sexual violence reported to the police are incorrectly categorised as >>false reports=, leading to a failure by the police to investigate further. This reluctance to believe the complainant frequently occurs where the complainant does not fit a >victim stereotype= or where there are some inconsistencies and omissions in their account of events.

8.5.2 The police (and the Director of Public Prosecutions), on the other hand, are obliged to initiate criminal prosecutions against those complainants suspected of having made a false report. In our common law, the laying of false charges (calumnia) can be prosecuted under the umbrella offence of obstruction of justice.²⁰ Similarly, there is a line of cases²¹ which establishes that where a person has misled the police by making false exculpatory or inculpatory statements, that person's conduct can amount to a defeating or obstruction of the administration of justice.²² In addition, a person who is considered to have made a false report of sexual assault to the police is liable to be prosecuted either for perjury,²³ statutory >perjury=,²⁴ or even fraud.²⁵

8.5.3 Although it surely happens that the police rightly label some reports of sexual assault as false²⁶ and while some persons do lay false complaints, the Commission is not aware of any recent instance where a complainant in a sexual case

²⁰**S v Mene** 1988 (3) SA 641 (A), overturning a previous decision, **S v Sauerma**n 1978 (3) SA 761 (A).

²¹**S v Daniels** 1963 (4) SA 623 (E); **S v Burger** 1975 (2) SA 601 (C). See also Milton **South African Criminal Law and Procedure: Common-law Crimes (Volume II)** (third edition) 121.

²²See also section 101 of the Criminal Procedure Act 51 of 1977.

²³For the definition of perjury, see Milton **South African Criminal Law and Procedure: Common-law Crimes (Volume II)** (third edition) 131; Snyman **Strafreg** (third edition) 363 and especially 364, footnote 2.

²⁴Otherwise known as the making of conflicting sworn statements, or the offence created by section 319(3) of the **Criminal Procedure Act** 56 of 1955.

²⁵See also section 9 of the **Justices of the Peace and Commissioners of Oaths Act** 16 of 1963.

²⁶Interestingly enough, a recent study by Bollen, Artz, Vetten and Louw **Violence against Women in Metropolitan South African** (ISS Monograph Series No 41, September 1999), p. 54 found that most women in the study thought the police believed them and almost two thirds felt that the police understood their problem.

has been charged with obstruction of justice, perjury or any similar offence.²⁷

8.5.4 In order to formalise the position as regards to >false reports= the Commission recommends that the SAPS National Instruction 22 / 1998 on Sexual Offences be amended to specifically provide that police investigators should not infer from the reaction²⁸ of the complainant that he or she is unaffected by the sexual assault or is lying.²⁹ The Commission is pleased that the SAPS National Instruction 22 / 1998 does direct officers who are first on the scene to show the victim empathy (understanding) and not sympathy (pity), and to obtain a brief description of what happened to the victim (take notes, not a statement).³⁰ However, we would recommend that this particular paragraph of the National Instruction be exemplified by the inclusion of the following subparagraph (vi):

Never presume an allegation is false until it has been thoroughly investigated.

8.5.5 Finally, we would recommend that the new Sexual Offences Act provide that the Director of Public Prosecutions, should solely be responsible for making a decision not to initiate an investigation into a sexual offence allegedly committed against that victim. This decision may only be made after the DPP has consulted with the investigating officer. The relevant provision should read as follows:

Director of Public Prosecutions to decide whether police investigation should

²⁷According to a study released in 1991 by the Community Council Against Violence, 71 allegations of rape made to the Victoria (Australia) Police between 1987 and 1990 were categorised as >false=. Those cases accounted for only 4,8% of all rapes reported during this period. In 27 of the so-called false reports, the complainant was subsequently charged with making a false report. See Law Reform Commission of Victoria **Report No 46: Rape: Reform of Law and Procedure: Supplementary Issues** (July 1992), p. 25.

²⁸Some victims appear very composed and able to calmly discuss the assault. Others may be in a very distressed state and may not be able to relate details of the incident in an accurate or chronological manner.

²⁹See the Victoria (Australia) **Police Code of Practice for Sexual Assault Cases**, par 51.

³⁰Paragraph 5(3)(b).

proceed

xx. The decision as to whether the investigation by a police official of a complaint that a sexual offence has been committed should proceed, shall rest with the Director of Public Prosecutions.

8.5.6 We recommend that in order to give effect to this remedy, a positive duty should be placed on the police (the investigating officer) to inform the victim of this right. This can be done in the National Instruction by inserting the following paragraph under the present paragraph 6:

The investigating officer must inform the victim that he or she has the right to ask the Director of Public Prosecutions to review any decision not to initiate or proceed with an investigation into an alleged sexual offence allegedly committed against that victim. The investigating officer must assist the victim in the exercise of this right.

8.5.7 On the issue of prosecuting persons for making false reports and thereby obstructing the course of justice, it would be an option to place legislative restrictions on the circumstances in which complainants in sexual offence cases could be charged with any of the various offences relating to making false reports. In support of this view, it is argued that even genuine complainants risk being told that they will be prosecuted if they are found to be lying. Such a practice would not only be upsetting to the targets of such threats, but would also work to discourage many victims from reporting sexual offences to the police. A further argument is that, even where the report is clearly false, the matter should be dealt with by counselling, not criminal prosecution.

8.5.8 The Commission agrees that the police and the prosecution need to exercise considerable care before deciding to investigate and prosecute a victim of a sexual offence with any of the offences related to the making of a false report.³¹

³¹It should be realised that by laying a false complaint against another person, that other person can in turn institute civil and criminal proceedings against the person laying the false complaint inter alia on the basis of *crimen iniuria*.

8.5.9 To the extent that change is warranted, it is in the area of attitudes and administrative procedures, rather than legislation. At present, a decision to charge a complainant with making a false report, obstructing the course of justice, or perjury, is taken by any member of the police. Little guidance is provided as to what criteria should be used in deciding whether to lay charges. In our opinion, the quality of charging decisions in this area could be improved significantly if the responsibility for charging the complainant in a sexual offence case with the offence of making a false report, obstructing the course of justice, or perjury, lay with a more senior police person. This would ensure that charging decisions are made by suitably experienced persons.

8.5.10 **We therefore recommend that SAPS National Instruction 22 / 1998 on Sexual Offences provide comprehensive guidelines on the charging of victims of sexual offences for laying false charges, making false statements, obstructing the course of justice, perjury, etc. In addition, the National Instruction should provide that before a complainant in a sexual offence case can be charged with any of the offences related to laying false charges, authorisation must be obtained from the relevant Unit or Station Commander.**³²

8.6 Police corruption

8.6.1 In the CIETafrica study all police officers interviewed were asked if they thought there was ever room for corruption in rape cases. An astonishing three out of every four respondents (76%), coming from all police stations in the Southern Metropolitan Local Council area, claimed that there was room for corruption in rape cases.³³ Asked specifically if any of their cases had ever been mismanaged due to corruption, 37% said >yes=. The major areas of corruption were identified by police respondents as:³⁴

³²See also recommendation no 19 of the Victoria Law Reform Commission in **Report No 19: Rape: Reform of Law and Procedure: Supplementary Issues** (July 1992), p. 28.

³³See also Human Rights Watch / Africa **Violence against Women in South Africa** 93.

³⁴CIETafrica, p. 20 - 21.

- * Police are given money by the alleged perpetrator to destroy the case (by telling the complainant there is no evidence, etc);³⁵
- * Police take the suspect to the victim / complainant and tell them to give money to the victim / complainant (the perpetrator pays of the victim);
- * Dockets are stolen, lost or somehow destroyed.

8.6.2 To begin to address the issue, the CIETafrica study asked respondents why they thought corruption occurs. Greed for money was the primary reason given by 35% of police respondents, followed by negligence (20%). Only 14% of respondents identified underpayment as the reason for corruption. Other reasons given include the lack of sensitivity to sexual violence, the fact that the alleged perpetrator is known to the police official involved, poor working conditions and low morale among police, and poor supervision by senior police management.

8.6.3 The CIETafrica study also identifies false reporting of rape by women as a form of corruption.

8.6.4 The Commission wishes to state categorically that police corruption in any form should not be tolerated.

8.6.5 We therefore recommend that a docket monitoring system be introduced at station level with regards to reports of sexual offences. Until such time as the information contained on the docket is captured electronically it is recommended that critical documents get filed in duplicate.

8.7 Statement-taking procedures

8.7.1 Concerns raised about police statement-taking procedures take three main

³⁵The CIETafrica study (p. 21) reports a very disturbing form of police corruption: apparently there were occasions when police had sex with a victim to >check if she was raped= or as a form of >payment= for doing a full investigation. Hopefully isolated cases, this is arguably the worst possible abuse of office in relation to sexual violence.

forms. One complaint is simply that it takes far too long for a full statement to be taken.

The current practice is for statements to be taken down manually by the investigating officer. This process can take some time to complete. Added to the time required to arrange and carry out a medical examination, it may be several hours after the initial report before the victim is able to get some rest, and go home.

8.7.2 The second complaint is that undue pressure is often put on victims to give a full statement to the police as soon as possible, without their being allowed time to rest and recover.³⁶ This is seen as adding to the victim's trauma, as well as increasing the risk that the victim will omit significant details from her statement. In response to this criticism, the police argue that it is important for a statement to be taken from a victim as soon as possible after the incident, while the details are still fresh in the memory of the victim and before other factors consciously or unconsciously influence his or her re-telling of events. In addition, it may be necessary to have a statement taken quickly to enable questioning of a suspect to get under way.

8.7.3 In order to reduce the amount of time required to take a statement, it has been suggested that victim statements should be tape-recorded or video-taped rather than taken down manually. This should cut the time required for a victim to give a statement considerably and a tape transcript may also provide a more detailed account of what the victim actually told the police. Further, if statement-taking time could be reduced, there would be fewer objections to taking a full statement there and then.

8.7.4 The third complaint relates to the quality of the statements taken. Statements are often not taken down in the mother tongue of the victim and in the translation process important nuances and meanings are often lost. The practice of having English as the only language of the court exacerbates the problem.

8.7.5 Although some jurisdictions do prescribe that the first statement of the victim be tape-recorded (or even video-taped), it should be clear that this option is not

³⁶Paragraph 5.(2) of the SAPS National Instruction 22 / 1998 on Sexual Offences is very clear on this issue: >Obtain a brief description of what happened to the victim (take notes, not a statement)=.

viable in the South Africa situation.³⁷ It makes little sense to prescribe, as a general rule, that all statements of victims be tape-recorded for later transcription when some police stations in the rural areas do not have access to electricity or running water.

8.8 Provision of more information to victims

8.8.1 It is apparent from the submissions and the Commission's consultations that victims of sexual violence, like many other victims, are often inadequately informed about matters pertinent to their case and their role in the investigation and prosecution process. This not only contributes to a sense of powerlessness and uncertainty, but gives victims the impression that they are not cared about as individuals by the criminal justice system.

8.8.2 For the most part, problems with the communication of relevant information have not arisen because of any deliberate policy to withhold information on the part of particular agencies. Rather, they are more the result of a lack of resources, oversight, and a failure to develop appropriate procedures. We make some recommendations to address some of these problems,³⁸ but there is still considerable scope for improvement.

8.8.3 **To provide for a better flow of information to victims, we propose the following action:**

- (a) **A statement of duties of individual police officers in relation to the provision of information to victims should be formulated and incorporated into a police code of good practice;**
- (2) A docket monitoring system should be established together with a system which ensures that duplicate copies of all important information contained in the docket

³⁷See chapter 25 below for a detailed discussion on video taped evidence.

³⁸See par 2.6.4.6 on a case-flow management strategy; par 3.2.9.2 on the SAPS **National Instruction 22/ 1998: Sexual Offence**, and par 4.6.2 on a joint investigative team above.

are kept in safe keeping.

- (c) The Office of the Director of Public Prosecutions should formally assume responsibility, from the first appearance of the accused onwards, for directly communicating relevant information to the victim, rather than this being done through members of the police. An option worth pursuing is the establishment of attaching a designated Victim Liaison Officer to the office of the Director of Public Prosecutions;
- (d) Information pamphlets should be supplied routinely to victims at the time of reporting the crime, prior to the first appearance of the accused, and again following the date set down for trial. These pamphlets should provide basic information about the next stages of the process;
- (e) Responsibility for distributing information pamphlets should lie with whichever organisation has the primary responsibility for the case. At the reporting and investigation stage, sheets should be distributed by the police; prior to and following the first appearance of the accused in court, information sheets should be distributed by the office of the Director of Public Prosecutions.

8.8.4 However, it should be emphasised that these proposals to increase the provision of written information are intended to supplement, rather than replace, direct personal contact between the victim, the police, and the office of the Director of Public Prosecutions.

8.8.5 The adoption of these procedures should give victims a greater understanding of the processes that they will be involved in, and better prepare them for their role as witnesses. These procedures should also help make the experience of participating in the legal process less traumatic for victims and foster greater confidence in the system. These recommendations should also have minimal resource implications.

8.9 Fewer delays in medical examinations

8.9.1 Police instructions state that where a sexual offence has been reported, a medical examination of the victim should be carried out as soon as possible.³⁹ This is normally taken to mean within one or two hours. Despite these instructions, significant delays are still occurring in some cases. In some cases, delay is unavoidable.⁴⁰ In others, however, it appears to occur because the police >hold on= to the victim in order to help them identify the offender, or take the victim back to the crime scene. In such cases, not only may the victim=s physical and emotional welfare suffer, but the delay in conducting the medical examination may result in the loss of valuable forensic evidence.

8.9.2 Recommendations

As the decision whether to immediately take the victim for a medical examination or to proceed with another critical aspect of the investigation is dependant on circumstances which are unique to each sexual offence investigation no recommendation is made in this regard, bar that SAPS must give priority to having a medical examination done in order to ameliorate the anxiety experienced by victims prior to the examination. The Commission however invites suggestions as to the best ways to limit delays in relation to medical examinations.

8.10 Identity Parades

8.10.1 Introduction

8.10.1.1 Identification parades are an investigative tool used by the police and the evidence thereof is submitted in trial proceedings in an attempt to link the accused to the commission of the offence. It can be a very powerful and persuasive piece of evidence. However, for it to have any evidentiary weight the parade must be held

³⁹SAPS National Instruction 22 / 1988 : Sexual Offences, par 7.2.

⁴⁰Such as where the district medical officer is unavailable.

according to certain rules. These rules attempt to ensure that the accused is fairly treated and the witness not traumatised.⁴¹

8.10.1.2 The South African Police Services follow the guideline that an identification parade must be held when the identity of a suspect is in dispute.⁴² This can take the form of a line-up of persons who resemble the suspect. The witness, if able to do so, indicates who the suspect is either by touching them or by pointing out clearly, sometimes with reference to a sign or symbol under which or in front of which the particular suspect is standing. One-way mirrors are being used increasingly. Another method is to show the witness a line up in photographic form.

8.10.1.3 This discussion on identification parades is not intended to be a general discussion of the legal implications and constitutional requirements of identification parades.

8.10.2 Current Law

8.10.2.1 Through the years South African courts have addressed themselves on a frequent and regular basis to the question of identification parades, and there is now a substantial body of case law on the issue. From the case law, the following general principles can be deduced:

- * The investigating officer of the case should not be in charge of the parade as this will heighten the suspicion of unfair conduct in court.⁴³
- * The accused does have the right to have legal counsel present at the identity parade.⁴⁴ This does not, however, does not place the onus of ensuring a fair

⁴¹ In **S v Masemang** 1950 (2) SA 488 (A) at 493 - 494 the Court held that evidence of the results of an identification parade are greatly enhanced if such a parade was conducted in a manner which >guaranteed the standards of fairness observed in the recognised procedure=. See also Annegret Rust and Colin Tredoux >Identification parades: An empirical survey of legal recommendations and police practice in South Africa= (1998) 11 **SACJ** 196.

⁴²Guidelines on **Support to Victims of Sexual Offences**.

⁴³See Kriegler **Hiemstra: Suid-Afrikaanse Strafproses** (5th edition) 78.

⁴⁴**S v Jija** 1991 (2) SA 52 (E); **S v Mhlakaza en andere** 1996 (2) SACR 187 (C).

parade on the defence, as the onus for ensuring the parade is fair rests with the prosecution,⁴⁵ here represented by the police.

- * The witness should not be allowed to see the suspect before the parade and the foils⁴⁶ on the parade should be strangers to the witness. Multiple witnesses should be shown the parade separately and also should not discuss the parade amongst themselves.⁴⁷
- * The number of foils on the parade should be eight (or ten in the case of two suspects). All people in the parade should be of similar build, height, age and appearance, and they should all be of about the same occupations and be similarly dressed and of the same sex and race.⁴⁸
- * Witnesses should be told that the culprit may or may not be on the parade and that they should indicate if they can make an identification or not.⁴⁹
- * Previously witnesses were required to touch the shoulder of the person they pointed out on a parade, but it has been recommended that this should not be a requirement, and that especially in sensitive cases the witness be allowed merely to point at the person or view the parade from behind a two-way mirror.⁵⁰
- * The identification parade should be recorded in an acceptable way - which is usually by completing Form SAP 329 - and it is suggested further that a video recording of the parade be made or a photograph be taken of the composition of the parade as well as of each identification that is made.⁵¹

8.10.2.2 The only statutory enactment that exists in relation to identification parades is section 37(1)(b) of the **Criminal Procedure Act** 51 of 1977 which authorises any police official to make persons available for identification in >such a condition,

⁴⁵**S v Mlati** 1984 (4) SA 629 (A).

⁴⁶The persons who take part in the identity parade.

⁴⁷**S v Nara Sammy** 1956 (4) SA 629 (T).

⁴⁸**R v Masemang** 1950 (2) SA 488 (A); **S v Mlati** 1984 (4) SA 629 (A).

⁴⁹**R v Nara Sammy** 1956 (4) SA 629 (T).

⁵⁰**S v Leepile** 1986 (4) SA 661 (W).

⁵¹**S v Mlati** 1984 (4) SA 629 (A).

position or apparel= as the police official may determine. This law places the authority and responsibility on the police to conduct identification parades, and it is thus important to examine police practices and procedures in respect of identification parades.

8.10.2.3 There is no specific police protocol on identification parades. The rules of practice the police do apply are found scattered in internal memorandums, guidelines,⁵² national instructions,⁵³ Form SAP 329, and a guide referred to as **Hints on the Investigation of Crime**.⁵⁴

8.10.2.4 The Commission would like to emphasise three aspects in particular:

- Firstly, the importance of adhering to the >recognised procedure= should be the first amongst the rules. The >recognised procedure= referred to in **R v Masemang**⁵⁵ does not, strictly speaking, consist of rules of law, but is basically rules of police practice based upon considerations of fairness and guidelines gleaned from reported cases. Insistence on compliance with the >recognised procedure= should be instilled.
- Secondly, the need for urgency in holding an identification parade must be stressed. This point was emphasised by Goldstein J in **S v Dhlamini**⁵⁶ where he stated that >the dependability and indeed the probability of an identification at the ... parade diminishes with each passing day=. Identity parades should be held as soon as possible after arrest, and not just before the trial.
- Thirdly, the requirement in paragraphs 25, 28, and 31 of Form SAP 329 that the witness make his or her identification by **touching** the shoulder of the suspect is problematic. Police practice further dictates that, in the event of any identification

⁵²See pages 30 - 31 of the SAPS Guidelines on Support for Victims of Sexual Offences.

⁵³See, for instance, paragraph 12 of National Instruction 22 / 1998 on Sexual Offences.

⁵⁴See also the 18 rules of practice as regards identification parades as submitted by Du Toit et al **Commentary on the Criminal Procedure Act** 3-6 et seq.

⁵⁵1950 (2) SA 488 (A) at 493 - 4.

⁵⁶1997 (1) SACR 54 (W) at 61b.

being made in this manner, it is desirable that a photo be taken of the actual act of identification. Although the purpose of this rule requiring physical contact is to eliminate any possibility of the identifying witness being misunderstood as regards his or her specific identification,⁵⁷ it is submitted that a clear **pointing out** of the suspect should also suffice.

8.10.2.5 There is a contradiction between, on the one hand, paragraphs 25, 28 and 31 of Form SAP 329,⁵⁸ and on the other hand, the **Guidelines on Support to Victims of Sexual Assault** and **National Instruction 22 / 1998 on Sexual Offences** as to the requirement that the witness should touch the suspect (and pose for a photograph). This may lead to confusion by police officers as to which procedure they should follow. The Guidelines and National Instruction 22 / 1998 on Sexual Offences specifically provide that the victim does not have to touch the suspect.⁵⁹ The result is that a police officer who seldom deals with sexual offence cases may, quite reasonably, follow the prescripts of Form SAP 329 without realising that a different rule applies in sexual offence cases.

8.10.3 Submissions received

8.10.3.1 **Ms W L Clark**, a senior public prosecutor from Verulam, says that where it necessary, >and interestingly enough, it seldom is in sexual abuse cases=, identification parades should be held. **Ms Clark** states that identification parades is invaluable in proving the identity of the suspect in those (few) cases where identity is in dispute. She says alternatives such as allowing the witness to view photographs are seldom of much use as the accused invariably claims that the witness was told which photograph to point out, or that the photograph in question in some way suggested to the witness that this was the perpetrator. Because of this and the potential of abuse, she warns against the use of photographic line-ups.

⁵⁷Du Toit et al **Commentary on the Criminal Procedure Act** 3-12.

⁵⁸Or rule 18 in Du Toit et al **Commentary on the Criminal Procedure Act** 3-12.

⁵⁹It must be borne in mind that the Guidelines and the National Instruction apply only to victims of sexual offences and is not of general application to crimes being investigated.

8.10.3.2 **Ms Clark** further points out that the **Criminal Procedure Act, 1977** is silent on how an identification parade should be held; this is a matter of police practice. She says the police should be made aware of how traumatic it is for anybody, especially a child, to have to physically touch the suspect on parade in order to point him or her out. She believes the use of one-way mirrors will go a long way towards alleviating the victim=s distress.

8.10.3.3 **Profs Snyman and Swanepoel** of the Department of Criminal and Procedural Law, Unisa point out that the codes of practice used by the police to set up and conduct identification parades are not rules of law, and non-compliance with any specific code does not ipso facto deprive the parade of its evidentiary weight. Therefore, they argue that it is not a set rule that a witness must touch the body of the suspect in order to effect a positive identification. In its submission, the **Johannesburg Child Welfare Society** states unequivocally that requiring a child witness to touch the suspect on an identity parade is >completely unacceptable=. The **Society** points out that conflicting accounts exist of whether or not touching is required, but says where it is the practice to require the (child) witness to touch the suspect, this must be done away with. The **Society** believes all identification parades must take place behind one-way mirrors.⁶⁰

8.10.3.4 The combined submission by the **SAPS Child Protection Units, KwaZulu Natal**, state that one-way mirrors are becoming a normal practice for use during identification parades. The use of one-way mirrors is also propagated by **Supt Nilsson and Insp Riedeman** of the SAPS Youth Desk, Western Cape, the **S A National Council on Child and Family Welfare**, and the **Western Cape Street Child Forum**. The **Attorney-General : Transvaal** submits in this regard that legislation appears necessary to provide for identity parades involving child victims to always be held by using one-way mirrors.

⁶⁰The **National Council of Women of South Africa** shares the views of the Johannesburg Child Welfare Society.

8.10.4 Evaluation and Recommendations

8.10.4.1 As indicated above, a full exposition of the police practice rules as they relate to identification parades falls outside our present focus. From our cursory examination it would appear that there is no single or uniform set of police rules relating to the holding of identification parades, that different and conflicting rules are prescribed by police protocols with different legal standings (forms, guidelines, national instructions, etc.), and that there is a clear need for a revision of the existing rules.⁶¹ The practices applied when investigating crimes should, if possible, be standard.

8.10.4.2 **We therefore recommend that the existing police practice rules and forms (especially Form SAP 329) be revised, be codified in a National Instruction on identity parades, and that such a National Instruction be operationalised as soon as possible. Without being unduly prescriptive the Commission recommends that a witness be entitled to be accompanied by a support person and that this provision be included in the above National Instruction. A support person must, however, be informed that his or her role is solely to support the witness and that he or she may in no way interfere with the witness the holding of the identity parade.**

8.10.4.3 In response to the question posed in the Issue Paper, the majority of respondents are of the view that it is not necessary for the identifying witness to make his or her identification by touching the suspect. We have pointed out some of the difficulties with this rule of practice and the conflicting provisions regulating it. We are of the opinion that a clear **pointing out** of the suspect by the witness need not involve touching the suspect.

8.10.4.4 **It is therefore recommended that the envisaged new National**

⁶¹See also **S v Mhlakaza en andere** 1996 (2) SACR 187 (C) per Van Deventer R at 199: >Dit is duidelik dat sommige van bogenoemde reëls onsinnig, vaag en verouderd en onprakties is in die huidige Suid-Afrikaanse scenario. Dit is dringend nodig in die belang van die gemeenskap dat die sogenaamde reëls ten opsigte van foto- en parade- en uitkenningsprosedure in Suid-Afrika hersien word en deur duidelike, praktiese en doelmatige statutêre voorskrifte vervang word wat die belange van verdagtes sowel as dié van die Staat sal dien=.

Instruction on identity parades should spell out clearly that it is not appropriate for any witness to have to touch a suspect physically in order to identify a suspect, whether it be a sexual offence case or not, or whether they be the victim or another witness.

8.11 The compulsory HIV testing of persons arrested for sexual offences

8.11.1 Recently there has been mounting public concern and pressure on the authorities to take appropriate action regarding deliberate transmission of HIV infection. This has come about largely in response to a number of widely publicised incidents of deliberate transmission of HIV, accompanied by the very real concern that it is in most part women and young girls who are being exposed to HIV infection in this manner. As a result the Commission, at the request of the Parliamentary Justice Portfolio Committee, undertook an investigation into the compulsory testing of sexual offenders for HIV and the possible creation of a statutory offence aimed at harmful HIV-related behaviour. The Commission's HIV/AIDS Project Committee dealt incrementally with these two issues which entails that two Interim Reports⁶² containing the Commission's recommendations have been prepared.

8.11.2 In general, our law at present provides for HIV testing only with the informed consent of the person concerned; every person is entitled to privacy regarding medical information; and no general legislation exists which allows for disclosure of such information. Furthermore, neither currently available public health law nor criminal procedure makes provision for compulsory HIV testing of persons arrested for sexual offences with a view to disclosing their HIV status to victims.

8.11.3 As stated in the Fourth Interim Report,⁶³ the compulsory medical examinations (which would include HIV testing) currently provided for in the 1987 Regulations Relating to Communicable Diseases and the Notification of Notifiable

⁶²The Fourth and Fifth Interim Reports on the Aspects of the Law relating to AIDS respectively. Although titled >interim=, the reports contain final recommendations.

⁶³Page vii.

Medical Conditions conceivably provide for HIV testing but not for disclosure of the test results to third parties other than health authorities. Draft 1999 Regulations to amend the 1987 Regulations make provision for the notifiability of HIV and AIDS but not for the disclosure of HIV status to victims of crime (and not for testing arrested persons for HIV). The Fourth Interim Report also shows that although section 37 of the Criminal Procedure Act, 1977 provides for taking the blood of an arrested person to ascertain bodily features (which could arguably include HIV status), this is for evidentiary purposes in a criminal trial only. Moreover, there is no provision that allows disclosure outside criminal proceedings.

8.11.4 The Commission consequently debated the need for legislative intervention concentrating on the following pivotal issues:

- ! The high prevalence of HIV coupled with the high prevalence of rape and other sexual offences.
- ! The utility and limitations of HIV testing.
- ! Women's international and constitutional rights, including victims' rights.
- ! The arrested person's constitutional rights, especially the right to privacy.

8.11.5 The Commission concluded in the Fourth Interim Report that there is a need for statutory intervention to provide for compulsory HIV testing of arrested persons in sexual offence cases at the instance of the victim. The intervention is necessary in the light of women's undoubted vulnerability in South Africa today to widespread sexual violence amidst the increasing prevalence of a nationwide epidemic of HIV and in the absence of adequate institutional or other victim support measures. In these circumstances the Commission found that there is a compelling argument for curtailing an arrested person's rights of privacy and bodily integrity to a limited extent to enable his or her accuser to know as soon as possible after the arrest whether he or she has HIV. The benefit to alleged victims of this knowledge is not only immediately practical in that it enables them to make life decisions and choices for themselves and people around them; it is also profoundly beneficial to their psychological state to have even a limited degree of certainty regarding their exposure to a life threatening disease. The

Commission acknowledges that the arrested person's fundamental rights may be infringed and this must be countered in procedural and substantive safeguards built into the process created.

8.11.6 The Commission therefore suggested that the proposed change to the law should be based on the following principles:

- ! Compulsory HIV testing of an arrested person should in principle be victim-initiated. This will ensure that only a person with a material interest in the arrested person's HIV status may apply for a compulsory testing order. >Victim initiation= should include initiation of the testing process by a person acting on the victim's behalf where the victim is too traumatised to bring the application, or lacks legal capacity to act on his or her own.
- ! A specified standard of proof should be required on which to base an order for compulsory HIV testing. The Commission is of the opinion that this should be prima facie evidence reflected in depositions on oath that a sexual offence has been committed against the victim by the arrested person; that in the course of the offence the victim may have been exposed to the body fluids of the arrested person (eg that semen or blood could have been transferred from the assailant to the victim, or that the victim experienced traumatic injury with exposure to semen or blood); and that no more than 50 calendar days have lapsed from the date on which it is alleged that the offence in question took place.
- ! Compulsory HIV testing of an arrested person should take place only on authorisation by a court. Furthermore, this should be a discretionary power resting with the presiding officer hearing the application.
- ! In order to ensure an uncomplicated and speedy process and to protect the victim from a potentially further traumatising confrontation with his or her attacker, the arrested person (or his or her legal representative) should not be allowed to be present or give evidence in an application for compulsory HIV

testing. The arrested person should retain his or her right to apply to the High Court for review in the event that an order for compulsory testing is not properly granted in accordance with the prescribed requirements.

- ! The procedure should provide for the confidentiality of the arrested person's HIV test results so as to ensure that this information is disclosed only to the victim (or the person acting on his or her behalf) and to the arrested person.
- ! A limited period of time should be allowed for bringing an application for compulsory HIV testing *and* executing it. This period should coincide with the period during which a victim's own HIV test would not clearly indicate whether he or she had been infected with HIV (the >window period=). The Commission considers a time limit of 60 days to be appropriate.
- ! The state should be responsible for all costs related to an application for compulsory HIV testing of arrested persons and the execution of an order for such testing.
- ! The use of information relating to the HIV status of an arrested person obtained under the proposed legislation should be clearly limited: the HIV test results obtained should not be admissible as evidence in criminal or civil proceedings.
- ! Malicious activation of the proposed procedure or the malicious disclosure of the test results should be punishable.

8.11.7 On the basis of the above, the Commission recommended the adoption of a draft Bill and draft Regulations as contained in the Fourth Interim Report on AIDS. The primary purpose of the intervention is to provide a speedy and uncomplicated mechanism whereby the victim of a sexual offence can apply to have an arrested person tested for HIV and to have information regarding the test result disclosed to the victim in order to provide him or her with peace of mind regarding whether or not he or she has been exposed to HIV during the attack.

8.11.8 Although the Commission and many other groups advocate testing of persons accused of committing a sexual offence for HIV/AIDS, the Project Committee on Sexual Offences would like to sound a word of caution. In particular, the Project Committee on Sexual Offences would like to subscribe to the view that >the only meaningful HIV tests are the ones the *victim* can undergo. Since having arrested persons tested will only tell whether they had detectable levels of HIV in their blood at the time of the tests, such tests will not indicate whether victims have become infected. Victims of sexual offences will eventually have to submit themselves to HIV testing in order to ascertain whether they were in fact infected. Compulsory testing of arrested persons in order to inform victims of the arrested persons status will thus be a waste of resources if victims in any event will have to have themselves tested to establish whether HIV was in fact transmitted=.⁶⁴

8.11.9 As we have seen,⁶⁵ in order for PEP to be effective it must be taken as soon as possible after the assault and definitely within 72 hours. Very often it will take much longer than this to arrest the accused person and have him or her tested, rendering the test results an irrelevant factor for the victim in the decision on whether or not to take or stop taking PEP.⁶⁶

8.11.10 The suggestion by the Commission that it would be an incentive for victims of a sexual offence to come forward timeously if compulsory HIV testing of the arrested person were available,⁶⁷ is of little comfort to the Project Committee on Sexual

⁶⁴The opposing view as per par 8.18 of the Fourth Interim Report on Aspects of the Law Relating to AIDS, emphasis in the original.

⁶⁵See paragraph 7.1 above.

⁶⁶In par 8.17 of the Fourth Interim Report on Aspects of the Law relating to AIDS it is mentioned that some opponents of compulsory testing concede that testing the accused could provide useful information to the victim for ending PEP: if the arrested person tests negative, the victim could discontinue PEP and avoid the potential side effects of continued prophylactic treatment. See also R Jurgens et al **Are Compulsory HIV Testing and Disclosure of HIV Status Ever Justifiable? Ethical and Legal Analysis Using Sex Offenders, Health Care Providers, Patients as Examples** (Poster Presentation at the Third Annual Conference on HIV/AIDS Research, Montreal, 13-15 May 1993).

⁶⁷Par 8.19 of the Fourth Interim Report on Aspects of the Law relating to AIDS.

Offences.⁶⁸ The Project Committee on Sexual Offences is of the opinion that it will be a far greater incentive to victims of sexual offences to come forward and report cases if they knew they could have HIV tests and PEP provided to them at state expense.⁶⁹

8.11.11 Aside from this, even if one could immediately establish the HIV status of the accused by means of testing, it may accurately confirm that the accused was infected at the time of the offence but it cannot indicate with certainty that the accused was not infected at the time. In some cases the accused would test negative even though he or she is infected and infectious (in the so-called 'window period'). It is therefore evident that even if the accused tested HIV negative this would not indicate whether the victim has been infected with HIV.⁷⁰ It must also be pointed out that the victim will have to be tested, probably more than once, to determine his or her HIV-status, and most likely at his or her own expense.

8.11.12 **The Project Committee on Sexual Offences believes therefore that instead of advocating the testing of accused sexual offenders, we should concentrate on the health of the victim. Rather than the State paying for the HIV-testing of persons arrested on suspicion of having committed a sexual offence, the Committee feels that the money can be much better used by providing, at State expense, free HIV-testing and PEP to all victims of rape⁷¹ regardless of what the HIV-status of the suspect is or was.**

⁶⁸Indeed, as the Commission points out with reference to Rape Crisis, Cape Town in the same paragraph (par 8.19), most rape victims do report the incident to the police immediately after the commission of the offence, **despite the fact that they cannot now demand that the suspect be tested for HIV.**

⁶⁹Par 12.107 of the Fourth Interim Report on Aspects of the Law relating to AIDS points out that commentators were of the overwhelming opinion that all victims should have access to PEP at state expense.

⁷⁰Gostin et al (1994) **Journal of the American Medical Association** 1436 - 1444.

⁷¹Not all sexual offences bring the risk of HIV infection. It is therefore important to limit HIV-testing and the provision of PEP to those instances where there is a risk of HIV-transmission.

CHAPTER 9

MEDICAL EXAMINATION

9.1 Introduction

9.1.1 Given the importance of medical evidence in sexual offence cases, and the urgency associated with its successful collection and storage, this Chapter will also address issues relating to the medical examination of the victim of a sexual offence.¹

9.1.2 A victim of a sexual offence may at any time present him or herself at or be brought to a health care facility alleging that he or she has been sexually assaulted. The victim may have laid a charge and be accompanied by an investigating officer or may not wish to lay a charge but still needs medical treatment or is unaware of the process to follow after having been sexually assaulted. Victims may find it difficult to make the decision about laying charges and should be given the option of having the forensic specimens collected and stored until such decision is made.² **The Uniform National Health Guidelines** for dealing with survivors of rape and other sexual offences states that irrespective of the reasons for the victim approaching the health care facility, the medical examination and the health examination should be provided at the point of entry into the system.

9.1.3 Although an adult victim may not want to involve the police, it is important to note that in terms of the **Child Care Act**, 1983³ every dentist, medical practitioner or nurse who examines or attends to any child in circumstances giving rise to the suspicion that the child has been ill-treated, or suffers from any injury, single and multiple, the cause of which probably might have been deliberate is under obligation to notify the Regional Director of Health and Welfare of the district in which the child happens to be, of those circumstances. Similarly any person who examines, treats, attends to, instructs or cares

¹Again, see Chapter 3 above for a discussion of the medico-legal services involved.

²[Http://www.wch.sa.gov.au/yarrow/med.html](http://www.wch.sa.gov.au/yarrow/med.html)

³Section 42.

for any child in circumstances which ought to give rise to the reasonable suspicion that such child has been ill-treated, or suffers from any injury - the probable cause of which was deliberate, is obliged in terms of the **Prevention of Family Violence Act, 1993**⁴ to report such circumstances to a police official or to a commissioner of child welfare or a social worker. Failure to comply with either of these provisions is an offence and is punishable as such. Mandatory reporting is dealt with more fully, above.

9.1.4 Where a victim of a sexual offence reports the commission of the offence directly to the police, the departmental National Instructions: Sexual Offences: Support to Victims and crucial aspects of the investigation⁵ indicate the steps⁶ which need to be taken.

9.1.5 Whether the sexual offence has been reported timeously (within 72 hours) or not and regardless of whether the victim has washed or not, the SAPS National Instructions provide that the victim has to be taken to an accredited health care practitioner⁷ for a medical examination. Before doing so, the case docket must be registered and an SAP 308 (permission for a medical examination) must be completed. This form includes all the relevant details of the sexual offence and must record precisely which samples must be obtained by the accredited health care practitioner.

9.1.6 The victim is to be taken to the accredited health care practitioner by the investigating officer, who may only be present during the physical examination if the victim consents and the investigating officer is of the same sex as the victim.

9.1.7 The investigating officer is obliged in terms of the National Instructions to assist with the forensic analysis of the exhibits by establishing whether the victim had any sexual contact less than 72 hours prior to the alleged sexual offence. If this is the case,

⁴Section 4.

⁵National Instruction 22/1998.

⁶These steps correlate with steps provided for in AAssessing Justice System Response to Violence Against Women@ Kuriansky at <http://www.vaw.umn.edu/Promise/pplaw.htm>

⁷An accredited health care practitioner is a district surgeon or a person appointed by the Department of Health to conduct a medical examination of the victim of a sexual offence.

then he or she must arrange for samples to be obtained from the partner(s).

9.1.8 Once the samples have been obtained, the investigating officer must clearly mark the samples and forward them to the Forensic Science Laboratory.

9.1.9 Usually the parents or guardians of a child victim must give consent before a medical examination may be done, and may accompany the child during the examination. In the event that a parent or guardian of a child victim cannot be traced within a reasonable time, cannot grant consent in time, is a suspect in respect of the offence in consequence of which the examination must be conducted, unreasonably refuses consent; has a mental disorder and cannot consent to the examination or is deceased, an application must be made to a magistrate in terms of section 335B of the **Criminal Procedure Act**, 1977 for consent to conduct the medical examination.

9.1.10 Section 335B of the **Criminal Procedure Act** regulates the medical examination of minors towards or in connection with whom certain offences have been committed. This section provides as follows:

335B(1) If a police official charged with the investigation of a case is of the opinion that it is necessary that a minor in respect of whom it is alleged that an offence of an indecent or violent nature has been committed be examined by a district surgeon or, if he is not available, by a registered medical practitioner, but that the parent or guardian of such minor -

- (1) cannot be traced within a reasonable time;
- (2) cannot grant consent in time;
- (3) is a suspect in respect of the offence in consequence of which the examination must be conducted;
- (4) unreasonably refuses to consent that the examination be conducted;
- (5) is incompetent on account of mental disorder to consent that the examination be conducted; or
- (6) is deceased,

a magistrate may, on the written application of that police official and if he is satisfied that the medical examination is necessary, grant the necessary consent that such examination be conducted.

(2) If a magistrate is not available to grant consent as referred to in subsection (1), a commissioned officer as defined in section 1 of the Police Act, 1958 (Act 7 of 1958), or the police official in charge of the local police station may in writing grant such consent if the police official charged with the investigation of the case declares under oath that consent of a magistrate cannot be obtained within a reasonable period of time and the district surgeon or registered medical practitioner declares under oath that purpose of the examination will be defeated if the examination is not conducted forthwith.

9.1.11 The Gauteng Provincial Government Policy and Protocol on the Treatment of Child Abuse Victims⁸ states that as a result of various laws concerning minors being contradictory on the point of the age at which a minor is allowed to give consent for a medical examination, a child of 16 who has personally laid a charge and where the parents or guardians are not available, should be allowed to sign the SAP 308 on his or her own behalf. The investigating officer is obliged to supply a J88 form and the necessary crime kit to the accredited health care practitioner and to brief the accredited health care practitioner before the examination and ensure that the required samples have been taken.

9.1.12 It is important to note that when a mentally ill person who is not capable of consenting to medical treatment on account of his or her mental illness, becomes a victim of a sexual offence, consent for a medical examination must be obtained in writing in terms of the procedure set out in section 60A of the **Mental Health Act**, 1973.⁹

9.1.13 Where the commission of a sexual offence is reported to the police and a suspect has been apprehended, the suspect is also taken to an accredited health care practitioner for a medical examination in order to establish whether there is any evidence relating to the alleged sexual offence on or in the suspect's body. Samples from a suspect are used to help in ensuring that the right person is prosecuted. In terms of section 37 of the **Criminal Procedure Act**, 1977 a member of the police has the authority to request medical samples and to use force to acquire such samples where the suspect does not cooperate. The investigating officer must provide the accredited

⁸Circular No 67 of 1998, dated 18 June 1988.

⁹Act No 18 of 1973.

health care practitioner with a J88 which is to be filled in by him or her and after the samples have been obtained, must clearly mark them and forward them to the Forensic Science Laboratory.

9.1.14 Where a victim presents him- or herself (whether the police have been notified or not) for an examination, the general examination guidelines¹⁰ provide that primary health care facilities, district and regional hospitals and private practitioners must *inter alia*:

- Treat injuries accordingly.
- Take comprehensive history and medical notes.
- Take full particulars.

9.1.15 As is stated above¹¹ an accredited health care practitioner is only responsible for gathering medical evidence to confirm a sexual offence, and is not tasked with providing any medical treatment, for example treating an open wound. So although the general examination guidelines provide for treatment of injuries, an injured victim may not, depending on the person or facility to whom he or she presents him or herself, receive immediate and much needed medical assistance. In practice, the victim is referred to a local hospital. In this regard, these guidelines are misleading. In South Australia,¹² a forensic medical examination involves both medical care and the collection of forensic evidence thereby minimising the added trauma to the patient of having to consult with a different practitioner so as to obtain treatment.

9.1.16 The Uniform National Health Guidelines provide broad steps for accredited health care practitioners to comply with. These steps have been incorporated in the policy and protocol on the treatment of child abuse victims. These steps provide for the following procedure to be followed:

¹⁰As found in the Policy and Protocol on the Treatment of Child Abuse Victims, Circular 67 of 1998.

¹¹Chapter 2.

¹²[Http://www.wch.sa.gov.au/yarrow/med.html](http://www.wch.sa.gov.au/yarrow/med.html).

- introduction (name and qualification) of the accredited health care practitioner to the victim,
- taking a detailed medical history and a verbal history of the alleged incident,
- explaining the nature and purpose of examination. This means collecting evidence for court purposes which includes a full body medical examination of inter alia the genital and anal areas, taking possible samples or tests and recording detailed medical information,
- obtaining written consent on a consent form or SAP 308 to allow the practitioner to collect medical evidence and to disclose such findings in a court of law,
- doing a full medical examination,
- taking necessary samples and,
- recording detailed findings on the examination on the J88 form (in duplicate) and addendum (if space is limited on J88).

9.1.16 The Uniform National Health Guidelines suggest that after the examination at least the following procedures should be followed:

- emergency medical treatment should be given at the primary health centre or the victim must be referred to an appropriate centre,
- prophylactic treatment¹³ against sexually transmitted disease should be given,
- post-coital contraception should be given,
- the victim should also be given a letter to attend her nearest family planning centre following her next normal menstruation,
- information on follow-up services available should be given to the victim,
- referral to an appropriate counselling service should be given,
- victims should be counselled regarding the possibilities of HIV infection and referred for HIV counselling and testing,
- referral channels to provincial hospitals should be opened,

¹³See chapter 7 above for a discussion on HIV Post Exposure Prophylaxis (PEP).

- medical certificates for school or work should be provided,
- the victim should be informed of complaints mechanisms and how to use them,
- if the victim arrived without referral by SAPS but now indicates that she wishes to lay charges, the police should be called to the health centre,
- supply patient with information regarding - date and time of treatment and name, address and telephone number of doctor,
- do not hand J88/patient record card to patient,
- until a trial takes place, access to the privileged confidential information contained in the J88 is restricted legally to the investigating officer and Justice Department,
- the health worker should report any information which occurs in the consultation which could be useful to the case, and
- if deemed necessary, arrangements can be made to re-examine the victim after approximately 72 hours in order to look for the development of bruising.

9.1.17 As is mentioned previously, the Guidelines portray a systematic and victim friendly approach. The concern is that these Guidelines have not been implemented nationally and therefore no uniform approach exists. As these Guidelines have not been officially disseminated as policy, there is no obligation on practitioners to comply with them.

9.1.18 The protocol for completion of the J88 states that cases from outside the province or relevant magisterial district should not be seen. This provision is contradictory to provision made by the police National Instructions that even though a sexual offence has been committed in another jurisdiction, the victim may not be turned away and that a docket must be opened and dealt with as if it had been committed within that area - this includes the medical examination. The approach taken by the police is more plausible and victim sensitive.

9.1.19 The J88 form makes provision for recording of *inter alia*, past relevant medical history, developmental assessment, clinical findings in the case of alleged rape or other sexual offences, specimens taken for forensic analysis (including clothing such as

stained panties). After extensive consultation the Department of Justice substantially changed the J88. The revised forms were introduced in 1999. The revised form is regarded as containing anatomically correct diagrams and leaves enough space for a detailed evaluation following the examination.

9.1.20 As is discussed above¹⁴ the district surgeony has been severely criticised by victims and personnel of other departments such as the police and justice for not conducting examinations accurately, for lengthy delays before doing examinations and lack of information or referrals. The shift away from the old district surgeony to the new accredited health care practitioner is intended to address a plethora of such complaints and problems. Unfortunately this shift has not been met with much enthusiasm and is already fraught with problems.

9.1.21 Where a victim presents him or herself directly at a medical facility following a sexual assault the question arises as to whether the medical practitioner should at this point automatically collect forensic samples prior to treating the victim for any injuries. After debating this point the Project Committee are convinced that in relation to child victims of serious sexual assault automatic collection of forensic samples should be standard procedure. Naturally the police should be summonsed to the hospital and where they are unable to immediately assist a case number should be obtained over the telephone in order for the medical practitioner to proceed with the examination and treatment. The rationale behind this finding being that child sexual abuse is subject to mandatory reporting. However the collection of medical samples may be more traumatising to the child than the original assault and for this reason medical sampling is only recommended where the allegations of the sexual assault justifies such sampling. In order for this recommendation to be workable, crime kits will need to be available at all hospitals, naturally accompanied by practitioners who have been trained in using them. Due to the fact that an adult victim may wish not to report the offence he or she cannot be subjected to medical sampling where he or she has indicated that they prefer

¹⁴See Chapter 2.

not to report the incidence to the police.

9.1.22 In Washington D.C. the medical examination of a child in sexual offence cases is performed by a paediatrician specially trained to conduct sexual abuse and physical abuse examinations of children and not by an individual employed by the state.¹⁵ The Department of Justice carries the cost with regards to the paediatricians fees. Although there may be severe cost implications, using a person specialising in sexual assault examination for child and adult victims of sexual offences may be a viable alternative to using district surgeons or accredited health care practitioners in South African investigations. Accurately obtained expert evidence would assuredly lead to a higher conviction rate.

9.1.23 Dr Holohan of the Sexual Assault Treatment Unit at the Rotunda Hospital in Dublin¹⁶ is of the opinion though that more GPs should become involved in forensic medical examinations on a rota basis. In Dublin, all GPs are provided with >rape kits= routinely. To overcome lack of knowledge in this specialised area it has been suggested that the Irish Department of Justice fund courses so that GPs are paid for attending forensic medical examination courses if they are prepared to participate in rotas. This option may be more attractive than using specialist paediatricians or gynaecologists as the cost implications are not so severe and the GP may be more readily available to testify.

9.1.24 It is necessary to emphasise at this point that protocols and guidelines regulating the responsibilities and duties of the relevant state departments need to be both intra- and inter-sectoral to be effective. These documents need to accurately reflect who takes care of the victim during the internal processes between different sectors. For this reason the protocols need to be consistent, applied nationally and as stated above legislated for. For example if a child presents at a hospital with indicators of sexual abuse either a social worker or the police need to step in once the medical examination and treatment have been administered. The interfacing between the departmental protocols should also effectively minimise repeat interviewing of the victim. Where the victim presents him- or herself directly at a medical facility it should be emphasised that the medical practitioners should limit questioning to questions relevant to the medical examination.

¹⁵Seminar: Investigative and Prosecution Techniques for Online Child Exploitation Investigations: 6 & 7 September 1999, as stated by Joseph S. Gerbasi, US Dept of Justice, Washington D.C.

¹⁶[Http://www.iol.ie/imn/a98oct19/interview.html](http://www.iol.ie/imn/a98oct19/interview.html).

9.1.25 It is recommended that the victim is always provided with medical treatment by the same person collecting the forensic evidence and that the victim not be referred to another practitioner or facility. The opinion is held that it is crucial for the Department of Health to establish a National Code or Memorandum of Good Practice.¹⁷ Such directives should be obligatory and any practitioner not complying with them should be subject to discipline.

¹⁷In this regard, refer back to chapter 2.

CHAPTER 10

PROTECTION OF AND ASSISTANCE TO VICTIMS AND WITNESSES BEFORE TRIAL

10.1 Introduction and current position

10.1.1 Increasing levels of violence against witnesses create a barrier against disclosure and reporting of sexual offences to the authorities. Intimidation of victims and their loved ones accompanied with a very real threat to their safety often causes victims to abandon any hope of seeing justice being done. Fear of reprisal and repeat victimisation are chillingly real. Recently seven-year-old Mamokgethi Malebana was abducted and murdered after Daniel Mabote had been charged of rape and was let out on bail. If reporting an offence and subsequently appearing in court is perceived to be unsafe for victims and witnesses, justice will be compromised and offenders will be left to prey on other victims.

10.1.2 The criminal justice system is slowly but surely becoming more victim-oriented and concerned for victim=s safety, attitudes are changing, and hopefully more victims might be inclined to report. A greater emphasis on victim=s rights creates an atmosphere which moves away from an unsafe, threatening, adversarial environment to one which recognizes the traumatic experiences that victims=s have endured and attempts not to repeat it by secondary victimisation. Witnesses should be able to expect and receive protection and assistance when they come to court, in return for their essential role in supporting the operation of criminal justice.¹ In acknowledging the role of victims in the criminal justice process, the Director General of the Department of Justice and Constitutional Development approved a consultative draft of the Victim=s Charter in August 2001 which sets out, for the first time, the kind of services that victims of crime should expect, and explains how all the role-players and agencies that are involved in the criminal justice system should improve the treatment of victims of crime. The Victim Charter applies to all victims of crime who have suffered directly or indirectly as a result of the crime and who are for this reason drawn into the criminal justice system. To ensure accountability, compliance of the rights and standards set out in the Charter will be monitored by the relevant agencies.

10.1.3 Although some victims may need very basic levels of assistance, such as merely being informed of the court processes, others are in need of more concrete assistance which may even require that they be given personal protection and be relocated. The non-disclosure of personal information as a means of protecting a witness is dealt with in Chapter 18 below.

10.1.4 **The Witness Protection Act 112 of 1998**

¹ Joanna Shapland and Emma Bell 'Victims in the Magistrates' Courts and Crown Court' (1998) **Criminal Law Review** at 546.

10.1.4.1 Witness protection is designed to alleviate the stress and trauma of intimidation endured by victims while having to testify in court proceedings. According to the **Witness Protection Act** a witness² is any person who is or may be required to give evidence or has given evidence in any proceedings.²

10.1.4.2 Subsections 7(1) and (2) of the **Witness Protection Act** provides as follows:

7 (1) Any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may -

(a) report such belief -

- (1) to the investigating officer in the proceedings concerned;
- (2) any person in charge of a police station;
- (3) if in prison, a person in charge of the prison or registered social worker;
- (4) to the public prosecutor;
- (5) to any member of the Office for Witness Protection; and

(2) apply in the prescribed manner that he or she or any related person be placed under protection.

(2)(a) If a witness is for any reason unable to make a report as contemplated in subsection (1)(a) or to make an application for protection as contemplated in subsection (1)(b), any interested person or the investigating officer concerned, who has reason to believe that the safety of the witness or any related person is or may be threatened as contemplated in subsection (1), may make such a report or application on behalf of the witness.

10.1.4.3 The considerations for application for protection are set out in section 10(1) of the Act and states that the person tasked with considering whether the person applying for protection should be placed under protection or not must take the following into account:

- the nature and extent of the risk to the safety of the witness or any related person;
- any danger that the interests of the community might be affected if the witness or any related person is not placed under protection;
- the nature of the proceedings in which the witness has given evidence or is or may be required to give evidence;
- the importance, relevance and nature of the evidence given or to be given by the witness;
- the probability that the witness or any related person will be able to adjust to protection;
- the cost likely to be involved in the protection of the witness or any related person;
- the availability of any other means of protecting the witness or any related person without invoking the provisions in the Act; and

² Section 1(1)(xxiv) of the **Witness Protection Act** 112 of 1998.

•••• any other factor that the Director of the Office for Witness Protection deems necessary.

A person applying for protection does not necessarily have to be the victim of the crime, but may also be a >related person=. A >related person= is defined in the Act as any member of the family or household of a witness, or any other person in a close relationship to, or in association with, such witness.

10.1.4.4 If granted protection, the witness is held in >protective custody= during the period of testimony in the trial, after which the Witness Protection Program will assist the witness, if necessary, in resettlement at the end of the trial.

10.2 Comparative analysis

10.2.1 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (referred to as the UN Declaration below)

10.2.1.1 The preamble of the UN Declaration³ recognises that Athe victims of abuse of power, and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders@.

10.2.1.2 Section 6 of the UN Declaration specifically refers to judicial and administrative processes and their responses to the needs of victims. Section 6(c) encourages >proper assistance to victims throughout the legal process= and section 6(d) expressly provides that the judicial system should >take measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation@.

10.2.2 Witness protection programmes in the United States

10.2.2.1 The literature on witness protection programmes is both ambiguous and fragmented. More specifically the interchange of terminology and models by authors and legal scholars contributing to the witness protection debates is haphazard, with little attempt to discriminate between:

non-witness victims

victim witnesses (or non-criminal witnesses)

criminal witnesses

victim rights programmes

victim assistance services

³ United Nation Assembly Declaration of basic Principles of Justice for Victims of Crime and Abuse of Power [GA/RES/40/34] 1999.

witness assistance programmes
victim protection programmes

10.2.2.2 International research has shown that witness protection programmes are geared primarily at criminal witnesses (i.e. drug dealers, gang members, etc) and that 95% of programmes are victim assistance programmes with the remaining 5 percent geared to protecting witnesses for the state who are at risk of imminent harm because of their status as witnesses for the state. Healy⁴ also estimates that 75 to 100% of victims of violent crimes from gang-dominated communities are intimidated as witnesses and that prosecutors are reporting an increase in intimidation of state witnesses. This in turn undermines the functioning of the criminal justice system by denying critical evidence to police and prosecutors.

10.2.2.3 Most programmes, however, remain focussed on providing basic services to victims of crime, but there appears to be a shift to extend these services to what is referred to as 'derivative victims' (traumatised witnesses). The gist of this approach is the recognition that the lack of concern for victims and witnesses is detrimental to the state and the criminal justice system (specifically in relation to the number of prosecutions). There is increased attention to the notion that without adequate care and protection of witnesses in criminal trials, witnesses fail to testify for fear or threat of harm which leads to the subsequent dismissal of cases on the basis of lack of evidence or >prosecutability=.

10.2.2.4 Non-witness victims fall into the broader victim assistance programmes which tend to focus primarily on providing victims with trauma or crisis counselling, legal advice or information and victim advocacy as well as referrals to community or medical services. In contrast, the goal of witness protection for non-criminal and criminal witnesses is to alleviate the trauma of court appearances, to reduce intimidating and threatening behaviour directed at the witness and to provide for the general safety and security of that witness. The key concern, however, appears to be ensuring that the witness testifies or continues to give testimony on behalf of the state.

10.2.2.5 Research in the U.S.⁵ has also shown that there are three major types of sponsors of victim/witness assistance programmes. They are those provided by law enforcement departments, those provided by prosecutors' offices and those provided by NGO criminal justice service agencies. The most significant proliferation of these programmes, however, has been through the prosecution authorities.

10.2.2.6 An example of a witness assistance programme that aims at supporting victims of sexual offences who are entering the criminal justice system is the Wisconsin Sexual Assault Unit. This unit (located with the District Attorney's office) provides support to rape victims during trial and works with the Witness

⁴ KM Healy **Victim and Witness Intimidation: New Developments and Emerging Responses** (1995).

⁵ Albert R Roberts **Helping Crime Victims** Sage (1990) 120

Protection Unit (Sheriffs office) if the complainant/witness has been threatened or harassed. Services include:

- information relating to court appearances and court preparation;
- referrals to state compensation programmes;
- employer advocacy for wages to be paid during the trial or testimony;
- escorts and/or transportation to and from court;
- emergency child care;
- witness notification of postponed or re-scheduled trials;
- referrals to support agencies.

10.2.2.7 In Ohio, the Victim/Witness Division of the Greene County Prosecutors Office-

- provides services to victims from the time the crime is reported, through the entire investigation and prosecution process;
- primarily acts as a liaison between the victim (and the victim's family) and the hospital, law enforcement personnel and the prosecutors;
- provides court-related information such as witness notification, information about criminal justice procedures, transportation services, employer intervention, court escort and court support at all stages of prosecution.

10.2.2.8 U.S. Attorney General Janet Reno (1993)⁶ has also commented on basic victims rights that should be contained in most bills of rights around the world. For Reno, criminal justice mandates for the treatment of victims should, at minimum, include: (i) provisions for victims to be treated with dignity and compassion; (ii) to be informed of the status of their case; (iii) to be notified of hearings and trial dates; (iv) to be heard at sentencing and parole through victim impact statements; and (v) to receive restitution from convicted offenders. What needs to be done is- consultation by prosecutors with victims prior to plea agreements, account to be taken of victim input regarding important pre-trial release decisions such as the granting of bail, and protection of victims from intimidation and harm. The statement of purpose for the **U.S. Victim and Witness Protection Act** (1982) states the following:

To enhance and protect the necessary role of crime victims and witnesses in the criminal justice process: to ensure that the federal government does all that is possible to assist victims and witnesses of crime, within the limits of available resources, without infringing on the constitutional rights of the defendant; and to provide model legislation for state and local governments.

⁶ U.S. Attorney General Janet Reno at New York City National Candlelight Vigil **Victim's Rights: Two Decades of Dramatic Change** 25 April 1993

10.2.2.9 This Act has been updated to incorporate additional rights for victims. The **Victim=s Rights Act**, developed in 1990, requires federal law enforcement officers, prosecutors and correctional officials to use their Abest efforts@ to ensure that victims receive basic rights and services. Included in the Victim=s Rights Act is the right to be treated with fairness and respect for the victim=s dignity and privacy, to be reasonably protected from the accused, to be notified of court proceedings unless the court determines otherwise, to confer with the prosecutor, to restitution and to information about the offender=s conviction, sentencing, imprisonment and release.

10.2.2.10 Specific witness protection programmes such as the U.S. Federal Witness Protection Programme, which was established in 1970, has taken the >use a crook to catch a crook= approach to the witness protection programme. This, however, poses problems in that the majority of the witnesses who get access to this programme are criminal witnesses - though it has been acclaimed for being a valuable tool for fighting organised crime and major criminal activity, like drug-related offences. Slate,⁷ in his research on the witness protection programme, reports that approximately 97% of witnesses in this programme have criminal records or are involved in criminal activity. The consideration of needed protection is based on risk of loss to life, includes redocumentation, licenses, social security and so forth.

10.2.2.11 The **Violence Against Women Act** (1994) in the U.S. attempts to expand the definition, scope and function of witness protection by requiring the Department of Justice to study and evaluate the extent to which states have taken steps to ensure the confidentiality of communications between sexual and/or domestic violence victims and their counsellors. It is argued that without such a confidentiality law, victims will be even more reluctant to contact counsellors and centers for assistance, which might stop the victim from reporting the crime as well.

10.3 Discussion

10.3.1 One of the central issues for legal reform, in South Africa, is the balancing of interests between the rights of individuals accused of criminal offences on the one hand, and the interests of society and rights of individuals who look to the state for protection from crime, on the other. In the case of witness protection, this balancing act is further complicated by the division of criminal witnesses and non-criminal witnesses for the state.

10.3.2 The South African Witness Protection Act: learning from international experience

10.3.2.1 The South African **Witness Protection Act** and the Witness Protection Office appear to be following a pattern of criminal justice response to witness protection similar to the United States.

⁷ Rasdun N Slate 'Federal Witness Protection Program: It's Evolution and Continuing Growing Pains (1997) 2(16) **Criminal Justice Ethics**.

Internationally, there are two kinds of witness protection programmes that located at either end of the witness assistance continuum and which seem to work distinctly separately from one another. On the one hand, criminal justice services are attempting to provide basic victim support services in the form of information sharing and >comfort rooms=, and on the other, witnesses are subject to a kind of >protective custody= or >relocation programme= style of witness protection. Traditional witness protection focuses on the safety of the witnesses. Experience has shown, however, that individuals will not be willing or available unless they are confident that the State will protect their rights as well as their safety.

10.3.2.2 Chappell⁸ contends that the reluctance of witnesses in South Africa to come forward to testify in criminal cases is based primarily on fear. He further reports that the **Criminal Law Amendment Act** (1991) established a protective custody scheme for witnesses, potential witnesses and their dependents, simulating voluntary imprisonment, and thus few have utilised the programme. He refers to the more successful Goldstone Commission Witness Protection Programme which provides secure accommodation, has strict security, high levels of confidentiality and although only less than ten individuals were protected, all of the cases were successful. Though the programme is costly, Chappell argues that the Goldstone programme is an excellent starting point for the development of witness protection programmes.

10.3.2.3 The **Violence Against Women Act** (1994) in the U.S. appears to be attempting to expand witness protection services by bridging basic victim support services with traditional witness protection concerns. Witness protection therefore moves beyond the >use a crook to catch a crook= approach and creates access to protection services and devices to non-criminal witnesses.

10.3.2.4 Though the South African **Witness Protection Act** defines a witness as any person who is or may be required to give evidence or who has given evidence in any proceedings, it is not unlikely that the definition of a witness may also be limited to criminal witnesses or witnesses in high profile organised crime cases as is the experience in the United States.

10.3.2.5 Other major concerns relating to the application of the **Witness Protection Act** in sexual offence matters where witnesses need protection include:

- **Application for protection:**⁹ There is a danger of constructing criteria and tests to fit terms such as >extent of risk= so that they are geared towards organised crime related situations. Witnesses in sexual offence trials may be at risk of being sidelined in witness protection considerations because of the nature of sexual offences (not related to syndicates or crime bosses) and the high

⁸ Duncan Chappell 'The Administration of Justice in South Africa' (1994) 2(6) **Criminology Australia**.

⁹ Section 10 of **Witness Protection Act**.

incidence of sexual violence in South Africa.

- **The powers, function and duties of the Director of the Witness Protection Office:**¹⁰ There is no real sense of accountability as far as the Director is concerned, in terms of accounting for the reasons why an application for protection is approved or refused. While the witness protection officers have to account to the Director for their recommendations on an application for witness protection, the Director does not have to account to any person or body. This broad range of discretionary powers without an accountability clause opens up a potential for corruption.
- **Consideration of application for protection:**¹¹ There is a need for clarity on the issue of what the nature and extent of the risk to the safety of the witness entails. Does this constitute physical and emotional risk (i.e. perceived threat)? Moreover, the general focus in this section does not appear to be on the witness, and it seems to suggest that the Act should only be invoked as a last resort. This hardly encourages witnesses to testify if their safety is not guaranteed. This might in turn affect the rate of convictions.

10.4 Recommendations

10.4.1. In view of the recent developments surrounding the Victim Charter referred to above and the fact that the **Witness Protection Act** is still in its infancy, the Commission is not in a position to make substantive recommendations regarding the protection of or assistance to witnesses.

10.4.2 However, it may be useful for the Witness Protection Office to develop more comprehensive criteria as to what constitutes >risk= and >danger= as well as what the Director constitutes to be the >importance, relevance and nature= of evidence given in a criminal trial.

10.4.3. The Commission considers the following issues to be critical in the strive of the criminal justice system towards assisting witnesses and commends the drafters of the Victims Charter for including them:

- information relating to court appearances and court preparation;
- referrals to state compensation programmes; employer advocacy for wages to be paid during the trial or testimony;
- escorts and/or transportation to and from court;
- witness notification of postponed or re-scheduled trials;
- referrals to support agencies;
- services to victims from the time that the crime is reported, through the entire investigation and

¹⁰ Section 4 of the **Witness Protection Act**.

¹¹ Section 10 of the **Witness Protection Act**.

- prosecution process;
- liaison between the victim (and the victim's family) and the hospital, law enforcement personnel and the prosecutors;
 - providing court-related information such as witness notification, information about criminal justice procedures, transportation services, employer intervention, court escort and court support at all stages of prosecution.

However, the Commission recommends that the crucial aspect of emergency child care be addressed. If provision is not made for child care, the participation of witnesses in criminal judicial matters will be curtailed. The Commission assumes that distribution of information relating to access to the witness protection program will accompany or follow the final approval of the Victim Charter.

CHAPTER 11

BAIL

11.1 Introduction

11.1.1 Once an accused person has been arrested, he or she has the right to make an application to be released on bail. The purpose of bail is to strike a balance between the liberty of the accused (who, pending the outcome of the trial, is presumed to be innocent)¹ and the interests of society (the accused should stand trial and there should be no interference with the administration of justice).²

11.1.2 The release on bail of alleged perpetrators of sexual offences is a highly contentious one which has elicited much public debate. In fact, >much of the concern in official circles about law enforcement has been directed at the granting or refusal of bail=.³ The increasing public concern about the spiraling crime rate has resulted in demands that criminals be dealt with effectively and a perception that due process of law is >soft= on criminals, has been strengthened by incidents where hardened criminals who were released on bail subsequently absconded or committed further crimes after their release.⁴ In the recent matter of **Carmichele v Minister of Safety and Security and another**⁵ an application for leave to appeal was heard by the Constitutional Court. In this case the applicant sued the two Ministers for damages resulting from a brutal attack on her by a man who was awaiting trial for having attempted to rape another woman. Despite his history of sexual violence, the police and the prosecutor had recommended his release on bail. The Constitutional Court upheld the appeal and referred the matter back to the High Court. The Ministers will now have the opportunity to lead evidence as to whether or not they should be held liable for damages on the facts.⁶

11.1.3 The current legal position regarding bail is regulated by the **Criminal Procedure Act** 51 of 1977. This position has changed significantly since the publication of the Issue Paper. The relevant provisions will therefore be discussed in some detail.

¹ Section 35(3)(h) of the Constitution of the Republic of South Africa 108 of 1996.

² E du Toit *et al* **Commentary on the Criminal Procedure Act** (Service 22, 1999) at 9/2.

³ Kriegler J in **S v Dlamini** 1999 (2) **SACR** 51 (CC) at 56c-d.

⁴ MG Cowling 'Bail reform: an assessment of the Criminal Procedure Second Amendment Act 75 of 1995' **SACJ** (1995) 50-51. See also L de la Hunt and H Combrinck "'In the interests of justice": bail and the criminal justice system' in G Maharaj (ed) **Between Unity and Diversity** (1998) 317-318.

⁵ CCT 48/00 as heard on 16th August 2001.

⁶ [Http://www.concourt.gov.za/cases/2001/carmichelesum.shtml](http://www.concourt.gov.za/cases/2001/carmichelesum.shtml) on 01/08/20.

11.2 Current provisions of South African law

11.2.1 Position prior to 1994

11.2.1.1 Prior to the introduction of the 1993 Constitution,⁷ the position relating to bail was that a person accused of a crime was required to apply for bail him- or herself, or initiate the process, and bore the onus of proving on a balance of probabilities that he or she was entitled to be released on bail. The primary considerations confronting the judge or magistrate included whether or not the accused would stand trial, whether he or she had a propensity to commit further offences while out on bail and whether there was any risk of the accused tampering with evidence or interfering with the police investigation.⁸

11.2.1.2 Section 61 of the **Criminal Procedure Act** gave an Attorney-General the power to prohibit the release of an accused charged with certain serious offences, where he or she was of the opinion that the accused's release was likely to affect the administration of justice adversely or to constitute a threat to the safety of the public or the maintenance of public order.⁹

11.2.1.3 This position was changed with the enactment of the Interim Constitution. Section 25(2)(d) provided that every person arrested for the alleged commission of an offence had the right to be released with or without bail, unless the interests of justice required otherwise.¹⁰ The question immediately arose whether the implications of this provision would be that the State now had the onus of proving that the accused should not be released on bail. Although the courts differed in their interpretation of the effect of section 25(2)(d), the prevailing opinion was that this provision moved the onus from the accused to the State.¹¹

11.2.1.4 In the period following the enactment of the interim Constitution, a strong public perception arose that the courts were too lenient in granting bail. This public dissatisfaction with what was perceived to be an undue emphasis on the rights of an accused person contributed to the enactment of significant

⁷ Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter referred to as 'the Interim Constitution').

⁸ These criteria had evolved through development of common law and case law. See eg **S v Acheson** 1991 (2) SA 805 (Nm).

⁹ Section 61 of the **Criminal Procedure Act** (repealed by Act 75 of 1995).

¹⁰ This provision is found in section 35(1)(f) of the 1996 Constitution in slightly amended form: "Everyone who is arrested for allegedly committing an offence has the right... to be released from detention if the interests of justice permit, subject to reasonable conditions."

¹¹ See Du Toit et al 9/28-9/30 and authority cited there. Cf also N Steytler **Constitutional Criminal Procedure** (1998) at 137-138.

amendments to section 60 of the **Criminal Procedure Act** in 1995.

11.2.2 The Criminal Procedure Second Amendment Act 75 of 1995¹²

11.2.2.1 This Act, which came into operation on 21 September 1995, *inter alia* replaced section 60 of the **Criminal Procedure Act** (which had been a rather bland statement of the fact that an accused person may be released on bail) with a set of detailed measures regarding the granting of bail.

11.2.2.2 The amendments entrenched the constitutional provision that an accused person is entitled to be released on bail unless the court found that the interests of justice required his or her detention.¹³ Section 60(4) provided that a refusal to grant bail would be in the interests of justice if one or more of four specified grounds were established:

- (a) where there is a likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or the public interest, or will commit a Schedule 1 offence;
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial;
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system.

11.2.2.3 Subsections (5) - (9) of Section 60 detailed factors to be taken into consideration in determining whether any of these grounds had been established. These factors largely corresponded with the rules prevailing under common law and precedent.

11.2.2.4 The Amendment Act also introduced a mechanism aimed at limiting the granting of bail to persons accused of certain serious offences. Section 60(11) provided that an accused who was charged with an offence listed in Schedule 5¹⁴ or committed while the accused was on bail in respect of certain offences¹⁵

¹² As amended by Act 34 of 1998.

¹³ Section 60(1)(a) (prior to amendment).

¹⁴ Schedule 5 lists, among others, murder involving the use of a dangerous weapon or firearm, robbery with aggravating circumstances, rape, and certain drug offences.

would be detained in custody unless the accused, having been given a reasonable opportunity to do so, satisfied the court that the interests of justice do not require his or her detention in custody. The implication of section 60(11) was that the accused would bear a burden of persuasion to show that his or her detention was not required.

11.2.2.5 Section 60 in its amended form also required the presiding officer to play a far more active role in the proceedings than that usually expected from the judge or magistrate in a (predominantly) adversarial criminal justice system. Section 60(1)(c), for example, required the court to ascertain from an accused person whether the question of bail should be considered if this is not raised by the prosecution or defence. Subsections (2) and (3) conferred certain powers on the court, for example, to require that certain evidence be adduced or information be placed before the court. In addition, the court was required to weigh up the accused's personal interests against the interests of justice, even where the prosecution did not oppose bail.¹⁶

11.2.2.6 It has been argued that these provisions did not succeed in adequately addressing problems experienced with the release of accused persons on bail.¹⁷ This failure may be attributed to the following:

- (a) Members of the SAPS, prosecutors and judicial officers were ill-prepared to operate in a criminal justice system based on a culture of human rights as demanded by the new constitutional dispensation.¹⁸
- (b) Investigations were seldom properly directed by the prosecuting authority which also suffered from a lack of resources and experience.
- (c) Presiding officers were inadequately equipped to assume the >inquisitorial= role demanded of them in terms of the amendments.

11.2.2.7 The perceived failure of the 1995 amendments was highlighted by a number of tragic cases which

¹⁵ Offences listed in Schedule 1, committed whilst the accused was released on bail in respect of a Schedule 1 offence - section 60(11)(b). The listed offences include (amongst others) treason, murder, rape, robbery, assault when a serious wound is inflicted, arson and theft.

¹⁶ Section 60(10).

¹⁷ See submissions to Parliament - 1997.

¹⁸ In the Constitutional Court judgment in **Dlamini's** case, Kriegler J expresses this dilemma as follows: "People who had acquired special knowledge of the [country's criminal justice] system and had become skilled and sure-footed in its practice, were confronted with a new environment and lost their confidence."

received public attention¹⁹ and contributed to renewed demands for drastic measures to protect the victims of violent crime. The **Criminal Procedure Second Amendment Act 85 of 1997** followed as a direct consequence of this public concern.²⁰

11.2.3 Criminal Procedure Second Amendment Act 85 of 1997

11.2.3.1 This Act, which came into operation on 1 August 1998, introduced amendments of and additions to section 60 of the **Criminal Procedure Act**. One of the most significant provisions entails that where an accused person is charged with an offence listed in Schedule 6 of the **Criminal Procedure Act**, this person must remain in custody unless he or she satisfies the court that exceptional circumstances exist which permit his or her release.²¹ The offences in Schedule 6 include, amongst others, premeditated murder, murder of a law enforcement officer and rape committed under certain circumstances.²² This provision also applies where an accused person is charged with a Schedule 5 offence, or where the offence was committed while the accused had been on bail in respect of certain listed offences. In terms of section 60(11A)(b) an Attorney-General (to be read as Director of Public Prosecutions) may issue a written confirmation to the effect that an accused person is to be charged with a listed offence, and this confirmation will be *prima facie* proof of the charge against the accused.

11.2.3.2 Other significant measures include provisions to the effect that -

- (a) bail applications of persons charged with Schedule 6 offences will only be heard in the regional court unless the regional court is unavailable;

¹⁹ The following case made national media headlines during 1997. In December 1996, a man who had been arrested for the rape of a seven-year old girl appeared in the regional court for a bail application. He had been refused bail on two previous occasions, since he had threatened to rape both the girl and her mother for reporting him. However, on this occasion, the prosecutor indicated to the court that he had no objection to bail of R2000 being granted to the accused. The accused was promptly released, and soon after his release, the young complainant vanished. In July 1997, her body was found, and the accused in the rape matter was arrested on suspicion of having murdered her. At this point it was revealed that the prosecutor who handled the December bail application had failed to establish the facts of the case (in fact, he did not have the case file containing details of three child rape cases involving the accused). No application had been made for a postponement to obtain the case file or call witnesses. (De la Hunt and Combrinck at 321.)

²⁰ Par 3 of the Memorandum accompanying the Bill emphasised that the legislation was aimed at addressing public concerns regarding bail through a variety of measures.

²¹ Section 60(11)(a).

²² These circumstances include rape where the victim was raped more than once or by more than one person, where the victim was raped by a person charged with having committed two or more offences of rape, or by a person knowing that he has AIDS or HIV. The Schedule also lists rape where the victim is a girl under the age of 16 years, is a physically disabled woman who is particularly vulnerable due to her physical disability or is a mentally ill woman.

- (b) where an accused is charged with a Schedule 5 or 6 offence and the prosecutor does not oppose an application for bail, the presiding officer must note the reasons for this on record; and
- (c) an accused person does not have a right of access to the police docket for the purposes of the bail application.²³

11.2.3.3 The Amendment Act also inserts a fifth ground indicating that a refusal to grant bail will be in the interests of justice, namely A where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace and security@.²⁴ Section 60(8A) sets out the factors to be taken into account in considering whether this ground has been established.

11.2.3.4 Existing provisions that allow for the consideration of a number of factors that relate to the concerns of victims include, amongst others -

- a) the degree of violence towards others implicit in the charge against the accused;²⁵
- b) any threat of violence which the accused may have made to any person; any resentment the accused is alleged to harbour against any person or any disposition to violence on the part of the accused (as is evident from his or her past conduct);²⁶
- c) the fact that the accused is familiar with the identity of the witnesses and with the evidence that they might bring against him or her;²⁷
- d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;²⁸
- e) whether the investigation against the accused has already been completed;²⁹
- f) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;³⁰
- g) whether the nature of the offence or the circumstances under which the offence was committed is

²³ Section 60(14).

²⁴ Section 60(4)(e).

²⁵ Section 60(5)(a).

²⁶ Section 60(5)(b) - (e).

²⁷ Section 60(7)(a).

²⁸ Section 60(7)(d).

²⁹ Section 60(7)(c).

³⁰ Section 60(7)(e).

likely to induce a sense of shock or outrage in the community where the offence was committed;³¹
and

- h) whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused.³²

11.2.3.5 The amended provisions have recently been subjected to the scrutiny of the Constitutional Court. In the judgment reported as **S v Dlamini; S v Dladla and Others, S v Joubert; S v Schietekat**³³ the Court, per Kriegler J, examined the constitutional validity of the provisions relating to -

- (a) the use of the record of the bail proceedings against the accused at trial;
- (b) the general test to be applied in considering the granting of bail;
- (3) the various categories of factors that may be taken into account, especially factors not related to the likely conduct of the accused;
- (4) special provisions applicable in cases involving certain very serious charges; and
- (5) access by the accused to the police docket for purposes of a bail application.

11.2.3.6 In a unanimous judgement the following conclusions were drawn:³⁴

- (1) The Constitution and the amendments to the **Criminal Procedure Act** have provided a norm and a guide for judicial officers charged with the task of applying the bail provisions.
- (2) While persons may be arrested and detained for allegedly having committed offences, they are entitled to be released on reasonable conditions if the interests of justice permit.
- (3) The procedure laid down in the **Criminal Procedure Act** is handy for deciding whether the interests of justice permit release, and for fixing conditions of release.
- (4) A bail application is relatively informal, inherently urgent and serves a short-term purpose; the issue is not the guilt of the accused, but where the interests of justice lie in relation to bail. The court is to act as proactively and inquisitorially as may be necessary.
- (5) The essential exercise is to use the Criminal Procedure Act's checklist of relevant factors for and against the granting of bail, keeping in mind the use of conditions to minimise risks.
- (6) Where the public peace is a factor, the court should carefully consider whether exceptional circumstances which would justify the denial of bail are indeed present.
- (7) Likewise, where very serious crimes are involved, the court should be careful to ensure that the

³¹ Section 60(8A)(b).

³² Section 60(8A)(d).

³³ 1999 (2) SACR 51 (CC).

³⁴ [Http://www.concourt.gov.za/cases/1999/bailsum.shtml](http://www.concourt.gov.za/cases/1999/bailsum.shtml) on 01/08/31.

right to bail is not in fact barred by the effect of the special provisions applicable to such cases. The accused is entitled to a reasonable opportunity to make out a case for bail.

- (8) Although the accused's guilt may be relevant in a bail application, the central issue is whether the interests of justice permit the release of that accused on bail. Abuse by the prosecution of the right to cross-examine on that issue may result in the evidence being excluded later at the trial.
- (9) Whether or not the bail record may be used at trial is governed by fair trial principles.
- (10) Bail serves the liberty interest of the accused, but also the public interest by reducing the high number of awaiting trial prisoners and the number of families deprived of a breadwinner.

11.2.4 Other provisions regulating the release of an accused person on bail or warning

11.2.4.1 In addition to the provisions discussed above, it should be noted that there are additional measures permitting the release of an arrested person pending trial.

11.2.4.2 Release by a police official (A police bail@)

11.2.4.2.1 Section 59(1)(a) of the **Criminal Procedure Act** provides that an accused who is in custody in respect of certain offences may be released on bail by any police official of or above the rank of non-commissioned officer. This provision applies to offences other than those listed in Parts II or III of Schedule 2.³⁵ The offences in question are generally regarded as less serious offences.

11.2.4.3 Release by prosecutor

11.2.4.3.1 Section 59A provides for an Attorney-General (now DPP) or authorised prosecutor to grant bail to an accused person who is charged with a Schedule 7 offence.³⁶ This must be done in consultation with the investigating officer.

11.2.4.4 Release on warning

11.2.4.4.1 Section 72 of the **Criminal Procedure Act** provides for the release of an accused person on warning. Where an accused is in custody for any offence in respect of which a police official may release the accused under section 59, the official may release the accused from custody and warn him or her to appear before a specified court on a specified date in connection with the offence in question. This

³⁵ Part II of Schedule 2 lists, amongst others, murder, rape, robbery, assault (when a dangerous wound is inflicted, and housebreaking with intent to commit an offence. Part III includes murder, kidnapping, childstealing and housebreaking with intent to commit an offence.

³⁶ The offences listed include, amongst others, public violence, culpable homicide, assault involving the infliction of grievous bodily harm, housebreaking with intent to commit an offence, and malicious damage to property.

only applies to offences other than those listed in Part II or Part III of Schedule 2. An accused who is eligible for release by a court in terms of section 60 may also likewise be released on warning by the court in lieu of bail.

11.2.5 Summary of provisions regarding bail in sexual offence cases (against children and adults)

11.2.5.1 The general rule is that an accused person is entitled to bring an application for bail at his or her first appearance in court. The prosecution may oppose this application, in which case the ultimate decision regarding the release of the accused is determined by the court after an enquiry. Even where the issue of the accused's release is not raised by the prosecution or defence, the court may of its own accord enquire into the accused's position.

11.2.5.2 Where an accused person is charged with an offence listed in Schedule 6, the court is required to order the detention of the accused unless he or she adduces evidence which satisfies the court that exceptional circumstances exist which permit his or her release. The following offences are included in Schedule:

- (1) Rape under certain circumstances (see above); and
- (2) indecent assault of a person under the age of 16 years, involving infliction of grievous bodily harm.

11.2.5.3 Where an accused person is charged with an offence listed in Schedule 5, the court is required to order the detention of the accused unless he or she adduces evidence which satisfies the court that the interests of justice permit his or her release. The offences in question include rape and indecent assault.

11.2.5.4 In respect of all other offences, the general position prevails which means that the onus is on the State to show that the detention of the accused is in the interests of justice.

11.3 Submissions

11.3.1 The question of bail is dealt with in the Issue Paper under the heading of >Protection of Victims=.³⁷ It is discussed as one of two ways by which a court can act against an alleged offender in order to protect victims of sexual abuse from further violence and intimidation by the offender. The other mechanism is an interdict in terms of the Prevention of Family Violence Act of 1993.

11.3.2 The Issue Paper briefly sets out the legal position as it stood at the time, i.e. prior to the 1997 amendments. The Paper was produced after the 1995 amendments had come into operation and posed

³⁷ See Par 5.4.12 et seq.

the following four questions:³⁸

1. Should the accused in sexual offence cases be entitled to be released on bail?
2. What bail conditions should apply?
3. Should the views of the victim be taken into account at the bail hearing?
4. Should sexual offences against children be classified as Schedule 5 offences?

11.3.3 In addition, the Issue Paper noted the suggestion that the victim and his or her family should be notified of the impending release of the alleged offender from custody or bail.³⁹

11.3.4 The submissions received regarding these four questions are briefly examined below.

11.3.5 **Should the accused in sexual offence cases be entitled to be released on bail?**

11.3.5.1 The response to this question ranged from the position that accused persons should not be entitled to be released⁴⁰ to the position that a >blanket rule= prohibiting the possibility of bail is not feasible and that each case must be considered on its own merits.⁴¹ It is interesting to note that a number of respondents were of the opinion that bail is granted too readily to perpetrators of sexual offences, and that stricter provisions should be applied.⁴²

11.3.6 **What bail conditions should apply?**

11.3.6.1 The majority of respondents indicated that the safety and protection of the victim should be the first consideration when imposing bail conditions in sexual offence cases. Contact with the victim should

³⁸ See Par 5.4.16 and 5.4.17.

³⁹ Par 5.4.16.

⁴⁰ Submissions made by **Association for Persons with Physical Disabilities; Forest School for Cerebral Palsied Children; Agape School for Cerebral Palsied; South African Police Services (Child Protection Units: KwaZulu Natal).**

⁴¹ Submissions made by the **Attorney General (Pietermaritzburg), Senior Public Prosecutor (Verulam); Ms Thuli Madonsela (Department of Justice).**

⁴² Submissions made by **SAPS (Social Work Services); SAPS (Legal Services); SAPS (Child Protection Unit, East Rand); Department Welfare and Population development (Gauteng); Department of Health & Welfare (Mpumalanga).**

therefore be restricted to minimise the opportunity for intimidation or further violence.⁴³

11.3.7 Should the views of the victim be taken into account at the bail hearing?

11.3.7.1 The majority of respondents indicate that the victim's views should be taken into account.⁴⁴ However, **SAPS (Child Protection Units, KwaZulu Natal)** suggest that the views of the victim should not be taken into account, as this will aggravate the victim's fear for the ensuing court process if they are required to give evidence at the hearing. **Ms WL Clark, a Senior Public Prosecutor in Verulam**, is also of the opinion that the views of the victim can be taken into account as one of the factors to be considered, although they should not carry too much weight and must be looked at in the same light as any other pertinent factor. She cautions that it should be borne in mind that most children will be afraid of the person who has abused them and that they may be irrational in their fear@.

11.3.7 Should sexual offences against children be classified as Schedule 5 offences?

11.3.7.1A number of respondents indicate that this should be the case, without stipulating specific reasons.⁴⁵ Two respondents submit that less serious forms of indecent assault should not be included in Schedule 5.⁴⁶ **Adv R Songa**⁴⁷ recommends that abuse should not be classified as a Schedule 5 offence, since research has shown that some allegations of child abuse are unfounded@. Members of the SAPS Child Protection Units, KwaZulu Natal state that these offences should remain Schedule 1 offences.

11.3.8 Should victims be notified of release on bail?

11.3.8.1 The question of notification of imminent release was only addressed by one respondent, namely

⁴³ Submissions made by the **Attorney General (Pretoria), Senior Public Prosecutor (Verulam); Johannesburg Child Welfare Society; SAPS (Legal Services), SAPS (Child Protection Units, KwaZulu Natal); SAPS (Child Protection Unit, East Rand); SA National Council for Child and Family Welfare. Department of Health & Welfare (Mpumalanga).**

⁴⁴ **Prof J Swanepoel (Faculty of Law, UNISA); Tshwaranang Legal Advocacy Centre; Western Cape Street Child Forum; Association for Persons with Physical Disabilities; Thuli; Johannesburg Child Welfare Discussion; Department of Local Government, Housing and Land Administration (Mpumalanga); Agape School for Cerebral Palsied.**

⁴⁵ **Association for Persons with Physical Disabilities; Johannesburg Child Welfare Society; Department of Local Government, Housing and Land Administration (Mpumalanga); Agape School for Cerebral Palsied; Tshwaranang; Department Welfare & Population Development (Gauteng); SAPS (Youth Desk, Western Cape).**

⁴⁶ **Senior Public Prosecutor (Verulam); Ms Thuli Madonsela (Department of Justice).**

⁴⁷ **Private Law Department, University of the North.**

the **Attorney-General of Pretoria** who states that such notification should be compulsory.

11.4 Evaluation and recommendation

11.4.1 The question of release of alleged perpetrators of sexual offences on bail is a complex and highly emotive one. On the one hand, it is clear from the provisions of section 35(1)(f) of the Constitution and Justice Kriegler's discussion in **Dlamini's** case of the principles underlying the operation of the bail system that a blanket rule denying all sexual offenders (against both children and adults) bail would constitute an untenable violation of the arrested person's constitutional right to be released on bail if the interests of justice permit. In addition, it would offend against the presumption of innocence by imposing >anticipatory punishment= before conviction and sentence.

11.4.2 On the other hand, there is the realistic concern that victims of sexual offences are not safeguarded sufficiently against continued violence and intimidation by perpetrators who are released on bail. An additional cause of anxiety to victims of sexual offences is uncertainty about the arrest of the suspect, whether or not the suspect has been released on bail, which conditions have been imposed and the procedure to be followed in the event of a breach of the bail conditions. The adoption of a system which allows for the victim to be informed of and participate at all stages of the proceedings (including a bail application by the accused) may address some of the concerns. **The Commission recommends that victims and other state witnesses be informed of bail applications and participate in them if they choose to.**

Where a witness is the complainant in the matter or a person below the age of 18 years and such witness is called to or wishes to participate in the bail application, such witness must be declared a vulnerable witness⁴⁸ and be afforded such protective measures as the court may deem necessary. Where any other witness appearing at the bail application is likely to be vulnerable on account of age, intellectual impairment, trauma or cultural differences, or the possibility of intimidation or is likely to suffer severe trauma, an application for declaration as a vulnerable witness must be made. The declaration of vulnerable status as well as the finding in relation to the appropriate protective measures will remain in place unless the trial court should find otherwise. Experts may be called to establish the vulnerability of the second category of witnesses and the need for specific protective measures for both categories where necessary. However, the role of expert witnesses should not be restricted to determining vulnerability of witnesses. Expert witnesses should also be called to lead evidence as to the risk that the accused might pose to the complainant and or society, if released.

11.4.3 It has been argued that the inappropriate release of offenders on bail is not the result of the legislation being inadequate to accommodate the seriousness of offences. Rather, the difficulties arise

⁴⁸ See Chapter 18 below for detailed recommendations in relation to vulnerable witnesses.

around the implementation of the legislation - for example, where the prosecution fails to disclose the information that will enable a presiding officer to decide whether or not the release of the accused would be in the interests of justice (as was the case in the matter described above).

11.4.4 A number of the submissions presented to the National Assembly Portfolio Committee on Justice during public hearings on the proposed 1997 amendments similarly indicated that the 1995 legislation was adequate, and that the real problems regarding bail revolved around its implementation.⁴⁹

11.4.5 SAPS National Instruction 22 of 1998 lists the safety of victims of sexual offences under the heading of item 11, (Victim after-care) without highlighting issues surrounding bail. However item 3, (Providing victim assistance) prioritises the giving of information to victims on the progress of the case, and the measures to be taken to prevent re-victimisation. **As knowledge surrounding a bail application is often integral to the ability of the victim to prevent being re-victimised the Commission recommends that this aspect be included in the above National Instruction as well as the Policy Guidelines for the National Director of Public Prosecutions.**

11.4.6 The Project Committee on Sexual Offences finds it troubling that although the existing legislation regulating bail seems theoretically sound, somehow the theory does not meet with the experience of complainants and other witnesses who should or do participate in bail proceedings in practice. A possible solution would be to include legislative provisions similar to those set out in section 18 of the **Domestic Violence Act** 116 of 1998, that require *inter alia* that the SAPS and prosecuting authority formulate detailed instructions and directives on how to deal with issues of bail in sexual offence cases. Such provisions could be accompanied by a requirement that statistics should be kept of the number of schedule 5 and 6 bail applications as well as the number of successful applications and reasons for release on bail, and that such statistics should be submitted to Parliament bi-annually. **Comment is invited on this point. Irrespective of the option followed, the Commission recommends that training and guidance be given to all officials dealing with bail applications so as to enhance the implementation of the amended legislation (which the Commission deems to be adequate).**

11.4.7 The reform of the substantive criminal law relating to sexual offences will have an impact on existing legislation regulating bail. For example, Schedule 6 of the **Criminal Procedure Act** currently lists the offence of rape >where the victim is a girl under the age of 16'. These provisions will have to be aligned with the new extended definition of rape. In effect a much wider range of offences will fall within the ambit of Schedule 6 if the substantive law recommendations are enacted.

⁴⁹ See, for example, submissions presented by **Rape Crisis (Cape Town) & the Women and Human Rights Project (Community Law Centre, University of the Western Cape); Tshwaranang Legal Advocacy Centre; Human Rights Committee.**

11.4.8 In addition, consideration will have to be given to the way in which newly created offences should be dealt with. **Submissions are invited on whether these offences should be classified as Schedule 5 or 6 offences.**

11.4.9 Due to the length⁵⁰ of court processes, alleged family member offenders who do not qualify for bail are kept in jail. The effect of removing a father, for argument's sake, from the family home following allegations of sexual abuse, has the advantage of not removing the child victim from his or her home but also the disadvantage of possibly removing the breadwinner from the home. Two options present themselves as possible solutions to keeping the alleged offender financially responsible for his or her family. Firstly, an alleged child victim of sexual abuse could be removed in terms of section 14(4) of the **Child Care Act**, 1983, following a finding that the child is a child in need of care. The benefit of doing so is that the child is removed from an abusive environment. It could be argued that the removal of the offender may not necessarily ensure the safety of the child as other family members may blame the child for the financial hardship and turmoil within the home. The flipside of this argument is that the child may feel that he or she is being punished by being removed from the family home.

11.4.10 Although in specific circumstances it may be in the best interest of the child to remove him or her from home for his or her own safety, the Commission does not recommend the automatic removal of a child victim of a sexual offence solely to enable the breadwinner to be economically active.

11.4.11 The second option is to find a mechanism whereby the alleged offender can remain economically active and thereby financially responsible towards his or her family but at the same time not exposing the victim to the alleged offender. The creation of bail hostels is an innovative alternative to incarcerating persons arrested for the commission of certain. This concept has taken root in the United Kingdom, where persons are provided with supervised accommodation in the community once they are remanded on bail.⁵¹ The aim of the bail hostel seems to be to reduce the number of re-offenders pending trial, to provide alternate accommodation for alleged offenders who either do not have a fixed abode or who are accused of inter-familial crimes whilst enabling them to retain their employment or to obtain employment. According to the National Association of Probation and Bail Hostels,⁵² bail hostels provide an enhanced level of supervision for offenders and bailees (a person on bail). They provide places for individuals at the various stages of the criminal justice process, including bailees awaiting a court case; convicted bailees undergoing assessment; offenders on probation and released prisoners on licence. Hostels operate strict

⁵⁰ Case management and effective fast tracking of sexual offence cases is dealt with above.

⁵¹ [Http://www.parliament.the-stationery-office.co.uk/pa/cm199192/cmhansr.../Writtens-4.htm](http://www.parliament.the-stationery-office.co.uk/pa/cm199192/cmhansr.../Writtens-4.htm) as on 01/09/03.

⁵² [Http://www.youthinformation.com/infopage.asp?snID=48](http://www.youthinformation.com/infopage.asp?snID=48) as on 01/09/03.

rules governing behaviour, curfews are enforced and work programmes are agreed in order to reduce offending.

11.4.12 With regards to sex offenders the Scottish Executive⁵³ has found that not all sex offenders present the same level of risk to the community although there is a common perception that all sex offenders are high risk. The Consultation Paper on the Criminal Justice Accommodation Services⁵⁴ states that managing sex offenders is about minimising risk and maximising community safety. It has found that in the case of sex offenders, the responsibility for assessing and managing risk is shared between a number of agencies and that supervised hostel placements do not provide the safest environments for managing most sex offenders because it can lead to a concentration of this type of offender with risks of networking. However, it is noted that the risk to other communities is increased by releasing an alleged offender on bail without providing supervised accommodation. The Report suggests that local authorities might be encouraged to develop multi-agency panels to identify the accommodation needs of sex offenders, and to make housing decisions based on risk assessments and predicated upon minimising the risk to the public. The Report states that to date the success level of use of bail hostels has been mixed with many instances where the beds provided have been underused and the existence of a suspicion that the role of the hostel is confined to little more than providing a bed and address for court communications. According to the Report this is an expensive way to ensure that the accused can be contacted about future court appearances.

11.4.13 The Commission is aware of the fact that the Commission on Gender Equality included bail hostels in its deliberations during a two day summit in August 2001.⁵⁵ The proposal seems to be geared towards protecting victims of domestic violence, child abuse and incest who are often forced to live with the perpetrator of the abuse pending the outcome of the case.

11.4.14 The Commission deems it appropriate to refrain from making proposals in this regard pending the findings of the Commission on Gender Equality.

⁵³ Criminal Justice Accommodation Services: A Review and Consultation Paper at [Http://www.scotland.gov.uk/consultations/justice/cjar-10.asp](http://www.scotland.gov.uk/consultations/justice/cjar-10.asp) as on 01/09/03.

⁵⁴ Ibid.

⁵⁵ City Press August 5 2001.

CHAPTER 12

ADVERSARIAL VERSUS INQUISITORIAL TYPES OF CRIMINAL PROCEDURE.¹

12.1 Introduction

12.1.1 The Commission has had to consider the system of criminal procedure that should govern the conduct of trials in relation to sexual offences. This chapter aims to inform that decision by setting out the essential nature of the two major systems of criminal procedure and explaining the basis of the Commission's recommendation in this regard.

12.2 Historical background

12.2.1 There are two major legal systems for establishing fact: the Anglo-American (or so-called strict, adversarial or common law) system and the Continental (also referred to as the enquiry type or free or civil law) system,² which applied in pre-colonial Africa and in most of the non-English speaking countries of Europe. However, it is important to note that there are no two pure systems in existence. What exists are hybrids which are predominantly adversarial or civil law in nature.

12.2.2 Fundamental differences exist between these two systems which, in a large measure, determine the procedural and evidential processes that apply in the courts. This is of particular importance when considering the applicability of both the rules of evidence, as applied in South African courts, and the entire field of criminal procedure in relation to sexual offence cases.

12.2.3 To enable an assessment of each system, an understanding of the reason for each system's origin and development must be considered. The development of these two seemingly opposing systems commenced in the 12th century. At that time there was a change in the organisation of communities which were no longer confined to small self-supporting units. Consequently, the law developed to keep abreast with these changes and this development was left to the courts. As will be seen, the United Kingdom and France differed greatly in the course that they adopted.³

12.2.4 The rival accusatorial and inquisitorial systems differed fundamentally on a key method of

1 For a detailed discussion on these two modes of criminal procedure see further the South African Law Commission **Discussion Paper 96** >Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure - Police Questioning, The Role of Judicial Officers and Judicial Management of Trials) 30 June 2001

2 Schwikkard, Skeen & Van der Merwe **Principles of Evidence** Cape Town: Juta at p 6-7.

3 M P Bakshi >Changing the Criminal Law= **Journal of the Indian Law Institute** October-December 1994 Vol. 36 No.4 at p 2.

investigation and adjudication: reliance on the accused to furnish testimonial evidence of their guilt. The common law courts disfavoured this method.⁴ In the United Kingdom this development led to a struggle, from the 12th century, between the common law courts and the ecclesiastical courts. The former felt that an accused should not have to incriminate him or herself by way of either an oath or information extracted through torture and must, accordingly, have the right to remain silent. By contrast, confession was the essential component of the inquisitorial system employed by the ecclesiastical courts.⁵ The right to remain silent was established in the United Kingdom in the 17th Century in the case of **John Lilburne**.⁶ There are many ancillary related doctrines that flow from this. These include the presumption of innocence, determining who bears the burden of truth and the standard of proof required.⁷ Entire legal systems developed flowing from this differential treatment of the accused. This is also the justification for the development of the right to cross-examine an accuser.

12.2.5 Schwikkard, Skeen & Van der Merwe accurately assert that Ait is probably correct to say that all enlightened and refined procedural and evidential systems are honest attempts to discover and protect the truth. And in this respect there is much common ground despite the peculiar historical origins and ideological preferences that each system may have.⁸

12.3 **Characteristics of adversarial and inquisitorial types of criminal procedure**⁹

12.3.1 The central issue in an inquisitorial trial and adversarial trial is very different. In an adversarial trial the central determination is whether the prosecution can prove the accused's guilt beyond reasonable doubt. If the prosecution fails to meet this burden, whether because of negligence or simply a lack of evidence, the state loses its case. The presiding officer plays a passive role.

12.3.2 In an inquisitorial trial within the civil law systems, the judges play a much more active role.

4 Bakshi **Journal of the Indian Law Institute**, October-December 1994 Vol 36 No 4 at p 2.

5 G W O'Reilly >England Limits the Right to Silence and moves towards an inquisitorial system of Justice= **The Journal of Criminal Law and Criminology** 1994 Vol 85 No 2 at 410.

6 O'Reilly **The Journal of Criminal Law and Criminology** 1994 Vol 85 No 2 at 417 citing L Leonard **Origins of the Fifth Amendment: The Right against Self-incrimination** (2d ed.) 1986 at p 13-24.

7 O'Reilly >Comment on Ingram's AMoral duty@ to talk and the Right to Silence= **The Journal of Criminal Law and Criminology** (1997) Vol 87 No 2 at p 560.

8 **Principles of Evidence** Cape Town: Juta at p6.

9 This section is largely informed and drawn from work done by the South African Law Commission >Simplification of Criminal Procedure (A More Inquisitorial approach to Criminal Procedure - Police Questioning, Defence Disclosure, The Role of Judicial Officers and Judicial Management of Trials)= **Discussion Paper 96** Project 73 30 June 2001.

The judge, rather than the parties, is responsible for developing the evidence, calling and questioning witnesses himself or herself. In a minority of civil law jurisdictions this may include access to the *dossier* compiled prior to trial. By its nature this includes written statements (so that the judge is not confined to oral evidence led in court).

12.3.3 An Indian jurist, Bakshi opines that >under the inquisitorial system, the court and its adjuncts (the examining magistrate and the public prosecutor) exercise full control over the preliminaries, that is to say, the investigation and also presentation at the trial=. ¹⁰ The offender, once formally charged, is the central party in the investigation, in the sense that he or she and his or her counsel are entitled to see all statements of witnesses. The offender may initiate further investigations by suggesting that further leads be investigated. >The victim of the offence is also a full party, in the sense that he may (with counsel of his own) intervene as a *partie civile* in the re-trial investigation and in the trial, and have his claim to the civil relief heard=. ¹¹

12.3.4 The civil-law jurisdictions focus on establishing the truth and, accordingly, there are few barriers that restrict the judge in determining guilt. In contrast, in the United States the system of justice frequently subordinates the finding of truth to the protection of constitutional rights ... @.

12.3.5 This has led to a debate as to whether, in adversarial criminal systems of justice, the role of the court is confined to determining whether the state has proved the guilt of the accused beyond reasonable doubt or whether the court has a wider duty to establish the truth. ¹²

12.3.6 The accused=s participation in the trial process differs in the two systems. The trial in the civil system usually begins with an examination of the accused by the judge, exploring his or her background as well as his or her knowledge or participation in the crime. While the accused has the right to remain silent, refusal to answer questions is said to be exceptional. The accused is encouraged to participate in the trial and answer questions and should he or she wish to offer evidence in mitigation, it must be done at the trial. This is because there is no separate hearing on mitigation and both guilt and sentence are determined at a single trial. ¹³

12.3.7 An inquisitorial type trial will result in not only a verdict of guilty or not guilty, but the court will prepare a written judgment that summarises the evidence developed at the trial, the conclusions drawn

10 Bakshi **Journal of the Indian Law Institute** >Limiting the Criminal Law= 1994 Vol 36 No 4 at p 6.

11 Bakshi **Journal of the Indian Law Institute** at p 6.

12 See Chapter 40 below on the role of the presiding officer and the conflicting cases cited therein.

13 Pizzi and Marfoti >The New Italian Code of Criminal Procedure: The Difficulties of Building an adversarial Trial System on a Civil Law Foundation= **Yale Law Journal** Winter 1992 Vol 17 No 1 at p 9.

from that evidence (and the weight accorded to that evidence), and any legal issues that arise during the trial. If the accused is found guilty, the judgment will also state the sentence and why the court considered this sentence appropriate. The decision need not be final as the rights of appeal are extremely broad and are extended to both parties after trial. The parties can appeal the judgment=s factual conclusions as fully and easily as legal conclusions. The parties may even introduce new evidence on appeal. The prosecutor may appeal if he or she believes that the trial court mistakenly reached a judgment of not guilty.

12.3.8 Plea bargaining is a strong feature of the adversarial system. The civil law system makes it difficult for plea bargaining to take place because of its focus on establishing the truth. However, in practice, plea bargaining takes place in most of the civil law jurisdictions.

12.3.9 In the Anglo-American accusatorial system, the police play a primary role. On the other hand, in the civil law (mainly European) system, the police act as agents on behalf of the prosecutor or examining magistrate.¹⁴ For example, in Germany, police officers are delegated to the prosecutor=s establishment and in France there is a similar subordination, the latter being a neutral police officer¹⁵ who investigates all matters relevant to the case, both the inculpatory and exculpatory evidence. Swedish police have the use of a special device; if the police investigation is complete, but the police still feel that the case has not been completely resolved, the police may engage a witness psychologist who may question witnesses, the victim, the expert, examine the scene of the crime and who has access to the police information. The idea is that the witness psychologist may have a different approach. He or she may make observations that the police have overlooked.¹⁶ A number of case studies are referred to which indicate the usefulness of such a further investigation by an independent specialist in human behaviour.¹⁷

A brief exposition of the differences in these approaches follows below:

Accusatorial/adversarial

- public trial (with discretion to hold in camera hearings)
- oral
- passive presiding officer
- cross-examination of witnesses by opposing parties

14 Pizzi and Marfioti **Yale Law Journal** Winter 1992 Vol 17 No 1 at p 9.

15 Pizzi and Marfioti **Yale Law Journal** Winter 1992 Vol 17 No 1 at p 9.

16 E Smith >How to deal with Children=s Evidence= **Children=s Evidence in Legal Proceedings, An International Perspective** June 1989 Cambridge: Selwyn College 26-28 at p 19.

17 Ibid at 17-20.

- police run investigation
- strict system of evidence (exclusionary rules of evidence)
- competency requirements for witnesses
- parties responsible for the presentation of evidence in support of their respective cases
- contest between the parties
- subordination of the search for truth to either constitutional rights or rights established by common law.

Inquisitorial

- public trial (with discretion to hold in camera hearings)
- oral
- examining presiding officer
- questioning of witnesses by presiding officer
- prosecutor (or judicial) run investigation
- free system of evidence
- no competency requirement for witnesses
- all officials have the duty to search for the truth and evidence that is in support of and against the accused
- an enquiry to establish the truth

12.4. **Current application of the adversarial system in South Africa**

12.4.1 **Introduction**

12.4.2 South Africa applies the Anglo-American adversarial system together with a set of exclusionary rules of evidence.

12.4.3 Crime is considered an illegal act against the state and the state prosecutes the accused person. The crimes involving sexual violence are perceived as acts against society. The victim of a sexual offence therefore has little control over the process once he or she has made the complaint.

12.5 **The investigative stage**

12.5.1 The South African Police Services (SAPS) play a primary role in investigating cases of sexual assault. Although the discretion to prosecute lies with the National Director of Public Prosecutions,¹⁸ SAPS frequently makes this decision, either by refusing to take a statement or open a docket. In Germany

18 Section 20 of the **National Prosecuting Act** 32 of 1998.

there is a mandatory investigation termed the principle of legality and the Police have no discretion at all.¹⁹

12.5.2 As indicated above, in South Africa the SAPS investigates cases of sexual assault. Thereafter, the docket goes to the prosecuting authority which conducts the trial and the magistrate or judge, acting as the presiding officer, makes a finding on the criminal responsibility of the accused. Should the victim wish to claim medical or other damages, he or she would then have to institute a civil trial.

12.6 The role of the prosecutor

12.6.1 In South Africa the prosecuting authority is the National Director of Public Prosecutions.

12.6.2 As indicated above, in theory the prosecutor takes the decision whether a matter should proceed to trial.²⁰ Frohman²¹ argues that prosecutors typically justify decisions to reject a complaint on the ground that there are discrepancies in a victim=s story or an ulterior motive in the victim=s report of sexual violence. Often such decisions are based on whether the prosecutor believes that a case has a realistic prospect of conviction. Factors which may be decisive as to whether a case will be pursued include the relationship of the offender to the complainant, the circumstances of their first encounter, the amount of force used, the level of resistance shown by the victim and the quality of the evidence.

12.6.3 Where a decision has been made to proceed with a case, the next major procedural step involves a bail application. The general approach of the prosecution is that where a victim has been sexually assaulted, bail applications should be opposed.

12.6.4 On 1 August 1998 the **Criminal Procedure Second Amendment Act** 85 of 1997 came into operation. One of the most significant provisions is that when an accused person is charged with an offence listed in Schedule 6 of the **Criminal Procedure Act**,²² this person must remain in custody unless he or she satisfies the court that exceptional circumstances exist which permit his or her release.²³ Schedule 6 offences include rape committed in certain circumstances such as rape committed while the perpetrator knows that he has the acquired immune deficiency syndrome or the human immunodeficiency virus.²⁴

19 Detlev Freshee >Children=s evidence within the German Legal System= **Children=s Evidence in Legal Proceedings** Cambridge: Selwyn College 26 - 28 June 1989 at p 30.

20 The **National Prosecuting Authority Act** 32 of 1998.

21 As quoted in Stanton et al **Improved Justice for Survivors of Sexual Violence** Cape Town 2 August 1997 at p 12.

22 51 of 1977.

23 Section 60(11)(a).

24 Section (11)(a) and Schedule 6(a)(iv) of the **Criminal Procedure Act** 51 of 1977.

12.6.5 This provision also applies where an accused person is charged with a Schedule 5 offence, or where the offence was committed while the accused had been on bail in respect of certain other listed offences. Schedule 5 offences include rape and indecent assault of a child under the age of 16 years.²⁵

12.6.6 Thereafter, once the trial has commenced, the prosecutor leads the evidence against the accused on behalf of the state.

12.7 **The role of the victim**

12.7.1 The victim is the main state witness and yet reports abound of victims who do not consult with the prosecutor until shortly before the trial. The responsibility of the prosecutor is to the state. It is assumed that the interests of the victim will be protected by the prosecutor, yet the interests of the victim and the state do not always coincide. The role of the prosecutor is not that of a legal representative for the victim. His or her role is to discharge the burden on the state of proving the guilt of the accused beyond reasonable doubt.

12.7.2 The victim is not entitled to legal representation as he or she is not regarded as a party to the dispute, and therefore has no representation in court. The accused on the other hand, if he or she is defended, can consult with counsel or his or her defence attorney before the case comes to trial, but cannot use it in court.

12.7.3 Victims are often required to describe their ordeal in close proximity or in visual contact with the accused, often after a long period has lapsed since the incident occurred. The victim is subjected to aggressive cross-examination, while the accused does not have to take the stand. The trial is not an opportunity for the victim to tell his or her story in their own way, rather he or she can only answer the questions asked.

12.8 **The role of the presiding officer during the trial**

12.8.1 Traditionally in South Africa, at least since colonial rule, the presiding officer plays the role of an impartial referee. He or she hears the evidence each side presents, intervening only for clarity and to apply the various rules of evidence. Furthermore, the presiding officer is under a common law duty to prevent irrelevant, repetitive and intimidating questioning. In South Africa presiding officers are slow to intervene to prevent aggressive and intimidating questioning. This has also been found to be the case in the United Kingdom, presumably because their role is one of independent arbiter and a conviction could be set

25 Section (11)(b) of the **Criminal Procedure Act 51 of 1977**.

aside if he or she intervened too much.²⁶

12.9 Conduct of defence lawyer / counsel

12.9.1 Cross-examination is described by Professor Schwikkard *et al* as a fundamental procedural right and an essential component of the accusatorial or adversarial trial. It follows after evidence in chief and the accused, or his or her legal representative, may conduct this questioning. The general proposition that the presiding officer may not cross-examine is subject to section 167 of the **Criminal Procedure Act**²⁷ which provides that a court may:

At any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

12.9.2 The power and extent to which a presiding officer may be more than a passive observer appears to be a subject of some confusion. On the one hand there are the legislative provisions contained in sections 167²⁸ and Section 186 of the **Criminal Procedure Act** 51 of 1977. What the Appellate Division interpreted this to mean was succinctly stated *obiter dictum* by Curlewis JA in **R v Hepworth**²⁹: ABy the words 'just decision in the case' I understand the legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and the Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied to both sides. A Judge is an administrator of justice, not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done. The intention of section 247 (now section 186 of the 1977 CPA) seems to me to give a Judge in a criminal trial a wide discretion in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person should get free by reason, inter alia, of some omission, mistake or technicality.³⁰

26 L Ellison >Cross-examination in Rape Trials= **Criminal Law Review** [1998] 605 at p 611 citing Stephen Holt, the prosecuting counsel in the case of Julia Mason who was subjected to cross-examination by her attacker that lasted for six days. Holt expressed the opinion that the trial Judge A Goddard Q.C. had been powerless to stop Ralston Edwards (the accused) in his questioning of Julia Mason. He acknowledged that the court of appeal would be bound to quash any conviction if the defendant could show that he had been prevented from putting his case.

27 51 of 1977.

28 See p 195 above for the section quoted in full.

29 1928 AD 265 at 277.

30 See further Professor N Steytler Discussion Paper for the Project Committee on the Simplification of Criminal Procedure: **Incorporation of Inquisitorial Elements in the Trial Process** at p 32.

12.9.3 This interpretation was followed more recently by the Supreme Court of Appeal in **S v Gerbers**.³¹

12.9.4 On the other hand, the courts have held that judicial officers may not enter the arena and cross-examine the appellant.³² In this case, the prosecutor was unwilling or unable to cross-examine the accused on his conflicting statements.³³ This resulted in an acquittal. If one refers to the power and duty of the presiding officer to call and question witnesses for a 'just decision in the case' as contained in the above sections of the CPA, the question arises whether this was not a case crying out for a more active and effective administrator of justice role from the presiding officer.

12.9.5 This confusion on the part of the courts (including the courts on appeal) is aptly illustrated by the case of **S v Matthys**³⁴ referred to by Professor Steytler in his paper on the **Incorporation of Inquisitorial Elements in the Trial Process**. In this case, the trial judge suggested to the prosecutor that he call the district surgeon to testify on whether the wound to the head was old or could have been caused by the victim falling as a result of a blow to the chest. On appeal, the Cape Supreme Court found that Ait was grossly irregular inasmuch as he was telling the prosecutor what the 'missing link' was, or put differently, the regional magistrate provided the prosecution with an opportunity of strengthening a link he knew to be weak.³⁵ Once again there are obvious contradictions between Judge Curlewis's dictum in **R v Hepworth** and the above two cases. These suggest that in the latter two cases, the learned judges do regard the criminal trial in the nature of a match or game, and not a process whereby the judicial officers have a much more responsible role than merely umpiring a match.

12.9.6 The limits of cross-examination are that:

- (a) Vexatious, abusive, oppressive or discourteous questions may be disallowed.
- (b) Misleading or vague questions should not be put by a cross-examiner.
- (c) Inadmissible evidence may not be adduced or elicited.

12.9.7 As regards the victim, the adversarial approach requires defence counsel to attempt to establish that the victim who is cross-examined is sufficiently uncertain to warrant a finding that the case against his or her client has not been established beyond reasonable doubt. To sow confusion and

31 1997 (2) SACR 601 (SCA) 606b quoted by Professor Steytler at p 32.

32 **S v Manicum** 1998 (2) SACR 400 (N).

33 Professor N Steytler **Incorporation of Inquisitorial Elements in the Trial Process** at p 35.

34 1999 (1) SACR 117 (C).

35 Cited by Professor Steytler at p36 citing Acting Judge President Hlophe at 119f.

uncertainty in the mind of a sexually assaulted and traumatised victim by an experienced legal representative is not difficult to imagine. The treatment of rape complainants in court can also be explained in terms of inherently combative nature of cross-examination. Advocates commonly speak of >breaking= and >destroying= a witness during cross-examination.³⁶ In the **Golden Rules of Advocacy**, Evans uses the term >butchering a witness=.³⁷

12.10 The court process

12.10.1 South Africa follows the model that is accusatorial in nature with a presiding officer, state prosecutor and defence counsel. Occasionally, assessors sit with a presiding officer, but they do not constitute a jury. Proceedings are held in open court where the witnesses give evidence before the accused (subject to provisions of the **Criminal Procedure Act**).³⁸

12.10.2 Linked to that system are a whole battery of technical legal rules which operate to exclude certain types of evidence on the basis that they are either irrelevant, prejudicial to the accused or inherently unreliable.

12.10.3 The courts are required to make a finding concerning the existence or non-existence of certain facts before pronouncing on the rights, duties and liabilities of the parties engaged in a dispute.³⁹ The existence of allegations and the level of proof is determined by the rules of evidence. Certain procedural rights also stem from the rules of evidence, for example, the right to cross-examine and the duty to adduce evidence.⁴⁰

12.11 Comparative Analysis

12.11.1 United Kingdom⁴¹

12.11.1.1 Introduction

36 Ellison **Criminal Law Review** [1998] at p 614.

37 K Evans, **The Golden Rules of Advocacy**, 1993, London, Blackstone at 97 cited by Ellison L **Criminal Law Review** [1998] at p 614.

38 Section 153 and 170A of the Act 51 of 1977.

39 Schwikkard *et al* **Principles of Evidence** at p 1 citing **S v Thomo** 1961 1 SA 385 A at 394C-D.

40 Schwikkard *et al* at p 1.

41 The entire section on the United Kingdom is drawn extensively from Chapter 3 of **Criminal Procedure systems in the European Community** edited by van den Wyngaert written by Dr AT H Smith at p 73-103.

12.11.1.1.1 The English criminal law and procedure is not contained in a single criminal code, but found in an enormous range of sources. These include statutes, the common law (in judicial decisions) and administrative guidelines and directions.⁴² Further, there is no written constitution or Bill of Rights and Parliament, theoretically, has the power to do as it wishes. Britain is a signatory to the International Covenant of Civil and Political Rights, but there is no right of individual petition. The criminal process is overwhelming adversarial in character, and there is debate as to whether the trial is not so much a search for the truth as a test of the evidence that is presented before the court by the parties. It is an essential principle that a person is innocent until he is proven guilty, and that the prosecution has the burden to prove guilt beyond reasonable doubt. It is trite that an accused should be permitted his or her liberty on bail and that nobody should be tried for the same offence twice. Proceedings must take place in open court. However, the courts possess inherent and statutory powers to hear cases in camera, and otherwise, to restrict the publication of matters when this is deemed to be necessary.

12.11.1.2 **Investigating and prosecuting authorities**

12.11.1.2.1 Most of the initial investigation in criminal offences in England is conducted by the police without any judicial supervision. The suspect is under no obligation to co-operate with these proceedings in any way. The accused has the right to remain silent. Since 1985, the decision to prosecute is no longer in the hands of the police, but that of the Crown Prosecution Service.⁴³

12.11.1.3 **The judiciary**

12.11.1.3.1 Criminal jurisdiction is primarily exercised in the Magistrates' Courts. These courts consist of three lay magistrates sitting together. They are advised by a legally trained clerk. In practice, the most serious cases are heard by a High Court judge.

12.11.1.4 **The accused**

12.11.1.4.1 The suspect has the right to silence. This means that he or she cannot be obliged in any way to answer questions under police interrogation, that his or her silence cannot be made the subject of adverse comment either by the judge or by the prosecution lawyer, and the accused is under no obligation to give evidence on his or her behalf. The accused is under no obligation to give any advance warning of the defence he or she intends to raise, with the exception of an alibi defence or a defence of mental incapacity, or where he or she intends to rely on the production of expert testimony. The prosecution must disclose in advance the material that it intends to place before the court, and must in addition make

42 C van den Wyngaert *et al* (editors) **Criminal Procedure Systems in the European Community** Butterworths London 1993 at p 73.

43 **Prosecution of Offences Act 1985.**

available any >unused material= upon which it does not propose to rely.⁴⁴

12.11.1.4.2 If the accused does decide to give evidence, however, he or she loses the shield that the privilege of the right of silence would otherwise afford him or her.⁴⁵

12.11.1.4.3 The right to silence is frequently criticised because it is exercised by professional criminals to escape conviction. As a result, a Royal Commission on Criminal Justice⁴⁶ was conducted which concluded that the right to silence should remain. However, once the prosecution has fully disclosed their case, the accused should be required to offer an answer to the charges against him or her, or else there is a risk of adverse comment at trial on any new defence he or she may then disclose or any departure from a defence which he or she has previously disclosed.⁴⁷ It also recommended that investigators in serious fraud cases should retain their existing powers to require answers to questions.⁴⁸

12.11.1.4.4 The **Criminal Justice and Public Order Act** (hereafter the **CJPOA**) of 1994 introduced the provision that in certain circumstances, adverse inferences could be drawn from an accused=s silence under police questioning.⁴⁹

12.11.1.5 **The victim**

12.11.1.5.1 The victim has no *locus standi* in the criminal proceedings. A compensation order can be made in his or her favour in relatively minor cases. There has been an increasing awareness of the need to consider the interests of the victim. Accordingly, the code for Crown Prosecutors provides that although the public interest is the paramount issue in deciding whether or not to prosecute, the interests of the victim are an important factor in determining the public interest and should be taken into account.

12.11.1.5.2 Legislation has been introduced in the United Kingdom in the wake of Aa number of high profile cases served to highlight the plight of complainants@ and Athe decline in conviction rate for rape

44 This is, however, subject to guidelines as it may be proper to with hold evidence from the defence where it is particularly sensitive. **Criminal Procedure systems of the European Community** at p 85.

45 **Criminal Procedure systems of the European Community** at p 84.

46 **Runciman Commission** July 1993.

47 **Royal Commission on Justice Report** recommendation 83.

48 **Royal Commission on Justice Report** recommendation 84.

49 Sections 34 -38 of the 1994 Act cited in the South African Law Commission **Discussion Paper 96** >Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure - Police Questioning, The Role of Judicial Officers and Judicial Management of Trials) 30 June 2001at p 29.

has also prompted action@.⁵⁰

These changes include:

- • • Sections 32 and 33 of the **CJPOA** of 1994 which abolished the requirement for the court to give the jury the warning about convicting the accused on the uncorroborated evidence of a person, where the offence charged is a sexual offence. The court now has a discretion to give a warning.
- • • Section 34A of the **Criminal Justice Act** of 1988 prohibits an unrepresented accused from cross-examining a child in person.
- • • The **Youth Justice and Criminal Evidence Act** 1999 introduced a broad range of reforms. One of the important innovations is the identification of a category of witness referred to as Avulnerable and intimidated@.⁵¹ According to their definition, certain witnesses who are vulnerable as a result of personal characteristics, should automatically attract the protection by certain measures. The court has the discretion to make available one or more of a range of measures available to a vulnerable witness.⁵²
- • • The **Criminal Justice and Investigations Act** of 1996 extended the duty of disclosure which already existed in serious or complex fraud cases to all Crown trials.

12.11.1.6 The trial phase

12.11.1.6.1 The trial commences with the arraignment of the accused. If he or she pleads not guilty, a jury is empanelled. The prosecutor outlines the case he or she intends to bring. During examination-in-chief a party is not permitted to ask leading questions. The witnesses are examined by counsel for the prosecution and defence, and while the judge may ask questions of a witness, such questions should be limited to clarification of the testimony of that witness.

12.11.1.6.2 Expert witnesses are seen as being part of the adversarial process; they are not court witnesses, but those of the parties. This is controversial and recently it has been challenged.⁵³ There is no appeal by the prosecutor against an acquittal. The prosecutor may appeal on the question of sentence. The accused may appeal against both conviction and sentence.⁵⁴

50 Ellison **Criminal Law Review** [1998] at p 605.

51 Section 16.

52 See Chapter 22 above for a detailed discussion, in context, of these reforms.

53 J R Spencer AThe Neutral Expert: An Implausible Bogey@ [1991] **Criminal Law Review** at p106.

54 **Criminal Procedure systems of the European Community** at p 94.

12.11.1.7 **Evidence**

12.11.1.7.1 In the United Kingdom the fundamental test of admissibility of evidence is relevance. However, not all evidence that is relevant is admissible and in many ways the English law of evidence in criminal cases can be seen as a body of rules relating to the exclusion of evidence.⁵⁵

12.11.1.7.2 In English law it is now possible to exclude the public from certain trials, give evidence by video tape and to use intermediaries to assist young victims.

12.11.2 **Scotland**

12.11.2.1 **Introduction**

12.11.2.1.1 Although Scotland is part of the United Kingdom, Scottish criminal law remains largely untouched by the English theory or method.⁵⁶ Scots law is largely uncodified. In developing the common law, and in the process of statutory interpretation, the Scottish criminal courts follow a system of precedent. The presumption of innocence is fundamental to the whole system of criminal prosecution and applies to every person charged with a criminal offence.⁵⁷ An accused's guilt must be proven beyond reasonable doubt of all facts required to establish the crime charged. In certain offences proof of certain facts by the prosecution may result in conviction unless the accused establishes his or her innocence.⁵⁸

12.11.2.1.2 The trial stage is strictly accusatorial and excessive involvement of the judges in the examination of witnesses has been criticised by the High Court on a number of occasions. The judge is entitled to ask questions to clarify ambiguities that are not being cleared up by counsel and questions which are relevant and important for the proper determination of the case, but that power must be exercised with discretion. Further, the court has no power to call witnesses. That is the function of the prosecution and the defence.

12.11.2.2 **Investigating and prosecuting authorities**

12.11.2.2.1 While the responsibility for the investigation of crime rests on the prosecutor, in practice it is delegated to the police who conduct the general investigation under the general supervision of the

55 *Ibid.*

56 Professor C Gane Chapter 12 **Criminal Procedure systems of the European Community** at p339.

57 **Slater v H M Advocate** 1928 JC 94.

58 **The Incest and Related Offences (Scotland) Act** 1986.

prosecutor.⁵⁹

12.11.2.2.2 The police are restricted to crime investigation and the prosecutor makes the decision whether or not to prosecute.

12.11.2.2.3 The general rule is that the prosecution of offences is the function of the Lord Advocate. However, an individual may bring a private prosecution after applying to the High Court. The Lord Advocate must give reasons for his or her concurrence in the prosecution.⁶⁰ If he or she does not concur, reasons must be given for doing so. Technically, the right of private prosecution is not limited to the victim, but the party will have to show that he or she at least has suffered a personal wrong through the commission of the alleged offence.

12.11.2.3 The prosecutor

12.11.2.3.1 The position of the prosecutor in the Scottish system of criminal procedure is a complex one.⁶¹ In Scottish criminal procedure the prosecutor is referred to as the Amaster of the instance@. The prosecutor is not a party to the proceedings and acts in the public interest. However, as he or she initiates the proceedings and certain proceedings are carried out in the name of the procurator fiscal himself, he or she is in no sense neutral.⁶²

12.11.2.3.2 The prosecutor has an absolute discretion to accept or reject any plea which may be entered by the accused at trial and the court has no discretion in whether or not to accept the prosecution=s decision in this regard. A similar discretion exists at the pre-trial stage which means that the prosecutor has absolute discretion to enter into plea bargaining.

12.11.2.4 The accused

12.11.2.4.1 At the pre-trial stage the accused or suspect is not obliged to co-operate in anyway with either the investigation or prosecution of charges brought against him or her. Thus at the pre-trial stage the suspect is not obliged to answer any questions put to him or her. Fingerprinting and similar procedures can only be done, prior to being charged, with a warrant from a court.

59 Section 17(2) of the **Police (Scotland) Act** 1967 makes provision for statutory compliance by the chief constable with lawful instructions from the appropriate prosecutor.

60 **Meehan v Inglis & Others** 1974 SLT (Notes) 61 and **McDonald v Lord Advocate** 1988 SCCR 239.

61 Professor Gane Chapter 12 **Criminal Procedure systems of the European Community** at p349.

62 Professor Gane Chapter 12 **Criminal Procedure systems of the European Community** at p349.

12.11.2.4.2 Section 19(1) of the 1975 Act provides that a person arrested on a criminal charge is entitled, immediately on arrest, to inform a solicitor that his or her assistance is required. However, it is important to note that while the fact of arrest must be immediately conveyed to the solicitor, access is only guaranteed prior to the first appearance in court and not while the suspect is being questioned by the police.⁶³ The same applies to detention for the purpose of investigation.⁶⁴

12.11.2.5 **The victim**

12.11.2.5.1 Unless the victim is bringing a private prosecution, the victim has no *locus standi* in criminal proceedings. Although the court has the power to order a convicted person to pay compensation, the victim is not even a party to those proceedings.

12.11.2.6 **The judiciary**

12.11.2.6.1 There are two types of criminal procedure in Scotland: summary and solemn. In the former the trial takes place before a judge sitting alone and the sentencing powers are significantly less than in solemn proceedings. In the latter the trial takes place before a judge and a jury. At the pre-trial stage, in solemn procedure proceedings (when the accused is indicted on a trial) there is a form of judicial examination by the prosecutor before the sheriff.

12.11.2.7 **Evidence**

12.11.2.7.1 Scottish criminal law retains a substantial and complex body of rules governing the taking of evidence. Professor Christopher Gane (Director, Centre of legal studies, University of Sussex) argues that the leading of evidence in a Scottish criminal trial does not involve a search for objective truth. Instead the trial is concerned with those facts and circumstances which can be established according to the rules of evidence.

12.11.2.7.2 Criminal trials are held in public, but the court has the power at common law to sit in private if justice cannot be done, or if publicity is not in the public interest. Further, the court may prohibit publication of the name of a witness or victim.⁶⁵ Proceedings are oral and generally pre-trial statements of witnesses are not admissible as evidence.⁶⁶ There is a general rule (to which there are exceptions) requiring

63 Professor Gane Chapter 12 **Criminal Procedure systems of the European Community** at p350.

64 Section 3(1) of the 1980 Act.

65 Section 11 of the **Contempt of Court Act** 1981.

66 Professor Gane Chapter 12 **Criminal Procedure systems of the European Community** at p356.

corroboration from an independent source so that together they point to the guilt of the accused beyond reasonable doubt.

12.11.2.7.3 Hearsay evidence is generally not admissible (there are many exceptions to the rule). Hearsay evidence is excluded because it is not the best evidence available, nor can its truthfulness or accuracy be tested in court.⁶⁷

12.11.2.8 **Questioning of suspects**

12.11.2.8.1 At common law there is no duty on a suspect to answer questions put to him or her by the police, except to provide their name and address. Giving false information may amount to the offence of perverting the course of justice.⁶⁸

12.11.2.9 **Judicial examination**

12.11.2.9.1 After being charged the accused must be brought before court for a judicial examination, at which the accused may make a declaration or statement. The prosecutor may question the accused to elicit any denial, explanation, justification or comment which he or she may have in regard to (a) the matters averred in the charge, (b) the alleged making by the accused of a statement, admission or confession to the charge, and (c) what is said in any declaration in regard to the charge by the accused at the examination. If the accused's response is a No plea: no declaration, the prosecutor will apply for the accused to be committed for further examination or for trial.

12.11.2.9.2 Bail applications are frequently held at this stage. An accused person does not have a general right to bail, but under the **Bail (Scotland) Act 1980** bail may not generally be made conditional on the pledge or deposit of money. Bail may be granted on conditions which are to ensure the accused's attendance at court, does not commit an offence while on bail, does not interfere with witnesses and makes himself or herself available for reports and inquiries to assist the court in dealing with him or her and the offence charged.⁶⁹

12.11.2.10 **Preliminary steps**

12.11.2.10.1 In terms of section 76 of the **Criminal Procedure (Scotland) Act 1975**, a pre-trial hearing may be held to deal with pleas in bar of trial (such as the accused's mental fitness to stand trial), objections

67 Professor Gane **Criminal Procedure systems of the European Community** at p368.

68 Sections 1 and 2 of the 1980 Act.

69 Professor Gane Chapter 12 **Criminal Procedure systems of the European Community** at p364.

to the content of the charge, etc.

12.11.2.11 **Trial**

12.11.2.11.1 Scottish criminal procedure sets time limits for the commencement of the trial and the responsibility is on the prosecutor to ensure compliance therewith. Failure to commence with the trial within 110 days from committal (if the accused is being held in custody) will result in the accused being set free and no further charges may be brought against him or her in respect of the charges in that indictment.⁷⁰

12.11.2.11.2 On the date of the trial, if the accused pleads not guilty, a jury will be selected. A plea of guilty may be accepted, but that decision rests with the prosecutor.

12.11.2.11.3 The prosecutor leads evidence first. The defence has the right to cross-examine witnesses led on behalf of the Crown. At close of prosecution evidence, the defence may ask the court to dismiss the charge on the ground that there is no case to answer. If this is not successful, and before any defence evidence is led, the clerk of the court reads the record of the proceedings at the judicial examination. Thereafter the defence evidence is led followed by closing arguments and direction to the jury from the judge.

12.11.2.11.4 The jury can return one of three verdicts: guilty, not guilty and not proven. The effect of a >not proven= verdict is the same as >not guilty= that of an acquittal. Thereafter, and if a finding of guilty is returned, the prosecutor must request a sentence because a finding of guilt does not automatically lead to sentence.

12.11.2.11.5 In solemn proceedings, the accused may appeal to the High Court against conviction, or sentence, or both. The prosecutor cannot appeal against an acquittal. It is competent to appeal against a conviction even where that conviction results from a guilty plea.

12.11.2.12 **Alternative to trial**

12.11.2.12.1 Section 56 of the **Criminal Justice (Scotland) Act 1987** extended the alternative of a fixed penalty to prosecution⁷¹ to other offences that could be tried in a district court. The prosecutor has the discretion to make a conditional offer of a fixed penalty as an alternative to prosecuting the alleged offender. If the latter accepts the conditional offer by making payment of the penalty or the first instalment, any liability to conviction is discharged.

70 Section 101 of the **Criminal Procedure (Scotland) Act 1975**.

71 Which until then had existed only in relation to traffic offences.

12.11.2.13 **Extraordinary measures**

12.11.2.13.1 In terms of the common law, the High Court Justiciary has the power of interfering in extraordinary circumstances for the purpose of preventing injustice or oppression.⁷² This power is known as the *nobile officium* and can only be exercised by a quorum of three of the High Court judges. It is usually invoked to remedy a *lacuna* or oversight in statutory provisions and is available to redress any exceptional and unforeseeable injustice or hardship in the criminal justice procedure.⁷³ Application can be made to the High Court for the exercise of this equitable jurisdiction by an accused or convicted person, the prosecutor or other aggrieved party.⁷⁴

12.11.3 **Germany**

12.11.3.1 **Introduction**

12.11.3.1.1 Germany has a continental system of criminal procedure. The federal laws are, in relation to criminal procedure, applicable throughout the country. Central sources are the **Code of Criminal Procedure** and the **Judicature Act**. These codes were created at the end of the 19th century. They have been subjected to numerous amendments and reforms which helped to get rid of the tenacious remnants of the feudal system reaching back to medieval times. Nevertheless, despite these amendments, the essence of these codes subsists and constitutes the basis of contemporary legal culture in Germany.⁷⁵ German law guarantees the right to be heard before any disadvantageous decision may be taken by the person whom it will directly affect.⁷⁶

12.11.3.1.2 An important principle is that of acceleration which imposes a duty on all judicial authorities to avoid any unnecessary delay in criminal proceedings. Accordingly, there are no court holidays in criminal matters. However, this principle must be applied in such a way that there must still be the necessary time for preparation of the defence or of the whole trial.⁷⁷

72 Professor Gane Chapter 12 **Criminal Procedure systems of the European Community** at p379 citing the Hon. HJ Moncrieff **A Treatise on the Law of Review in Criminal cases** Edinburgh 1877 p264.

73 **Boyle, Petitioner** 1922 SCCR 949.

74 Professor Gane Chapter 12 **Criminal Procedure systems of the European Community** at p380.

75 Professor H Kuhne Chapter 5 - Germany **Criminal Procedure systems of the European Community** at p137-139.

76 Art.103 GG provides a constitutional guarantee in this respect. Many provisions in the Code of Criminal Procedure according to Prof. H Kuhne at p145.

77 Section 229 **StPO** limits the periods of interruption within trial proceedings.

12.11.3.1.3 The *ex officio* principle applies and means that offences will be prosecuted (subject to two exceptions), whether or not the victim desires it.⁷⁸

12.11.3.1.4 The principle of the free evaluation of evidence applies, which means that there are, in principle, no rules of evidence. The free evaluation of evidence laid down in Section 261 the **Strafprozeßordnung (StPO)**⁷⁹ is a logical consequence of the endeavour to look for substantive proofs. The decisive element is the conviction of the court. In particular the judge is not bound by a plea of guilty. Of course this does not mean that all evidence is admissible@.⁸⁰ Certain evidence is inadmissible. This usually relates to the method by which the evidence was gathered. The central rule is that all forms of so-called third degree interrogations, for example, torture, threat, exhaustion, hypnosis, etc. are banned. This is the case even if the suspect had agreed.

12.11.3.1.5 Evidence acquired by infringing procedural rights, such as evidence obtained following a failure to advise the accused of his or her right to remain silent, will not necessarily be inadmissible.⁸¹ The Federal Court has ruled that only where violations of procedural rights which have a serious, decisive impact on the legal position of the accused should result in making such evidence inadmissible.⁸² There is much debate around this principle.

12.11.3.1.6 A further question arises in relation to whether further evidence which derived from an initially illegal method is admissible for example, a pointing out of a weapon without having warned the suspect. In Anglo-American jurisprudence this is referred to as the fruit of the poisonous tree doctrine@, by which all subsequent evidence is poisoned and consequently inadmissible. Despite much criticism, the German Federal Court does not generally follow that doctrine.⁸³

12.11.3.1.7 The principle of immediacy requires that live evidence be taken in court. The only exceptions provide for circumstances when it is not possible to get access to direct evidence.⁸⁴

12.11.3.1.8 Owing to the principle of instruction, which is the duty on all authorities involved in criminal

78 Section 77-77e **StPO** sets out the exceptions.

79 The German Criminal Procedure Act.

80 **Criminal Procedure systems of the European Community** at p147.

81 Section 136(1) **StPO**.

82 Professor Kuhne **Criminal Procedure systems of the European Community** at p156.

83 Professor Kuhne at p156.

84 Section 251-256 **StPO**.

proceedings to search for the truth and the presumption of innocence, the guilt of the accused must be proved beyond reasonable doubt.

12.11.3.1.9 Prior to the 19th century, secret proceedings were run by judges. Thereafter, the principle of public trials was introduced. However, this principle is under attack again as its critics argue that the publicity may endanger the accused and other participants. It has been successfully argued that publicity may threaten the efficiency of both the presumption of innocence and the privacy of the accused, victim and witnesses. These considerations are particularly relevant in cases of sexual assault or rape and has led to a prohibition on recording of a public trial and the exclusion of the public from certain trials.⁸⁵

12.11.3.2 **The judiciary**

12.11.3.2.1 Judges are independent and impartial. In courts of the first instance (local and district courts), lay judges can sit with professional judges. The vote of lay judges has the same weight as that of professional judges. The only difference is that lay judges do not have the right to inspect the files; their only source of information is the trial.⁸⁶ However, the principle of orality does apply in Germany and written documents may only be introduced by the judge reading the statement and the witness confirming it. Only in highly exceptional circumstances would the need for confirmation by the witness be dispensed with.⁸⁷

12.11.3.2.2 Until 1974 the pre-trial investigation was conducted by a judge. Historically, this was introduced in 1879 as there was a certain amount of distrust in relation to the neutrality of the office of the prosecutor as it had been newly created. However, as that distrust proved unfounded and as it was necessary to keep judges out of any work that was not judicial in nature, the legislator abolished the preliminary judicial investigation by the investigating judge in 1975.⁸⁸

12.11.3.3 **Statutory framework**

12.11.3.3.1 The German Constitution⁸⁹ has both a guiding and correcting function. In Germany, criminal procedure has been called Applied constitutional law⁹⁰. The European Convention on Human Rights that became part of federal law in 1953 is very similar to the German Constitution. The jurisdiction of

85 Section 169(2) ands 170 *et seq.* GVG.

86 Prof. Kuhne at 142.

87 R Pfaff (German Magistrate) German Technical Cooperation (SALC Project - Simplification of the criminal Procedure Act).

88 Prof Kuhne Chapter 5 - Germany **Criminal Procedure systems of the European Community** at p146-147.

89 **Grundgesetz**, GG.

90 Prof. Kuhne **Criminal Procedure systems of the European Community** at p138.

the European Court is explained by international law obligations and does not concern constitutional law, but exclusively the law of the European Convention on Human Rights.⁹¹

12.11.3.4 **Investigating and prosecuting authorities.**

12.11.3.4.1 Investigations of crimes are prosecutor-driven. The police play a supporting or secondary role. Special parts of the police forces are appointed to this function by state law.⁹² They must act on the instructions of the prosecutor, despite the fact that they remain at the same time within the organisational and hierarchal framework of the police.⁹³ According to Professor Kuhne of the Law Faculty of Trier, the police lead the investigation in practice. Only in cases of special public or political interest does the prosecutor play the role of Amaster of the investigation@, in co-operation with the police. One of the issues that Professor Kuhne identifies as problematic with regard to prosecutor driven investigations is that the latter lacks expertise in techniques of criminal investigation. This strongly impedes the prosecutor=s ability to really lead investigations. The practical result is that the prosecutor acts mainly as a legal supervisor of the police.⁹⁴

12.11.3.4.2 The prosecutor=s duty is to investigate crime and to look for both incriminating and exonerating evidence. The prosecutor has only limited discretion not to proceed in cases of petty crimes. The principle of legality requires the prosecutor to institute proceedings and bring the matter to court. The prosecutor represents the state=s case and bears the burden of proving the case. The prosecutor has the right of appeal both in favour of and against the accused.

12.11.3.5 **The defence**

12.11.3.5.1 A suspect may consult defence counsel at any stage of the proceedings. However, only in serious cases does the state pay for all proceedings. For example, during questioning by the police, the suspect may have a legal representative, but he or she will be responsible for those costs, unless it is an extremely serious case.

12.11.3.5.2 Defence counsel has unlimited access to the suspect in custody. Defence counsel has the right to participate in any investigative activity that requires the presence of the suspect (Section 167). The defence bears no burden of proof.

91 Prof. Kuhne at p139.

92 Section 152 (2) GVG **Polizei als Hilfsbeamte der Staatsanwaltschaft.**

93 Prof Kuhne **Criminal Procedure systems of the European Community** at p140-141.

94 Prof Kuhne **Criminal Procedure systems of the European Community** at p140-141.

12.11.3.6 **The victim**

12.11.3.6.1 In April 1987, the **Victim=s Right** amendment law⁹⁵ came into force which has improved the victim=s procedural rights. The victim has the right to be informed throughout the process and this includes access to the dossier by the victim=s lawyer. Consultation with and representation by a lawyer with rights of audience during the trial are free of charge if the victim is indigent.⁹⁶ During the hearing of the victim=s evidence, the public may be excluded to protect the privacy of the victim.

12.11.3.6.2 There are three different ways in which the victim may formally participate in the criminal proceedings.

12.11.3.6.3 Firstly, the victim may bring a private prosecution if the prosecutor decides not to institute proceedings.⁹⁷ However, the victim has no authority to instruct the police.

12.11.3.6.4 Secondly, for certain listed offences,⁹⁸ the victim may act as a joint plaintiff. Here the victim can support the prosecution case in his or her own right by pursuing their own interests. The victim has the right of presence and application and he or she may plead and file an appeal. An indigent joint plaintiff may apply for legal aid if the factual and legal problems are considerable. Empirical analysis indicates that accessory prosecution has been used, mainly to enforce civil claims.⁹⁹

12.11.3.6.5 Thirdly, the process of Ajoint procedure@ which enables the victim to bring a civil claim for compensation of damages resulting from the crime within penal proceedings. Professor Kuhne states that in practice the judges generally disallow applications for joint procedure without giving reasons purely by stating that the application is not suitable. The indicates that this is most unfortunate as it could be a very helpful procedure for victims saving the effort and trauma of going through a second ordeal of formal proceedings.¹⁰⁰

12.11.3.7 **Examination of body and mind**

12.11.3.7.1 A suspect may be submitted to an examination of his or her body to verify certain facts.

95 **Opferrechtsnovelle**

96 Prof Kuhne **Criminal Procedure systems of the European Community** at p144.

97 See further Section 374 *et seq* **StPO**.

98 See section 395 *et seq* **StPO** for list of crimes.

99 Prof. Kuhne **Criminal Procedure systems of the European Community** at p158.

100 **Criminal Procedure systems of the European Community** at p144.

Blood tests and medical examinations are permissible, if no detriment to health can be expected. In principle a judge must order such an examination, but in cases of emergency, the prosecutor or the police may order it. Other persons may be physically examined if they are potential witnesses, to detect traces of evidence of having committed a criminal offence on their bodies. However, with the exception of blood tests, no medical invasion is admissible unless the witness consents.

12.11.3.7.2 The taking of fingerprints and photographs of the suspect are possible insofar as it seems necessary for the investigation or for police data systems.¹⁰¹ This question is determined by the police, but can go on appeal.

12.11.3.8 **The trial**

12.11.3.8.1 After the police investigation and if there is sufficient evidence that a crime has been committed, the police transmit the file to the prosecutor who may then send it back for further inquiries.

12.11.3.8.2 If the prosecutor brings the case to court, the case first goes before a court competent to hear the main trial. These intermediate proceedings are similar in nature to committal proceedings. The court may take more evidence. It then decides whether to open the trial, or may order the opening of the trial according to the charge sheet or with certain alterations. The prosecutor may appeal against this decision, but not the accused.¹⁰²

12.11.3.8.3 The main trial commences with the summoning of the participants, examination of witnesses and experts, withdrawal of witnesses (experts may be present during the trial), interrogation of the accused as to his personal details by the presiding judge and reading out of the indictment by the prosecutor. The accused is advised of his or her right to remain silent and if the accused is willing to give evidence, he or she will then be interrogated, the taking of other evidence will ensue, followed by closing of evidence-taking, pleas of prosecutor and defence, last word of the accused, deliberation of the court (in camera) and finally the verdict given in public.

12.11.3.8.4 Despite the operation of the principles of legality and instruction, plea bargaining is still utilised in certain forms.¹⁰³ These are referred to as *Ainformal agreements* and is a current issue in Germany. They have evolved from a practice, in complex cases, by which defence counsel discusses the

101 Section 81b **StPO**.

102 Section 199-212b **StPO**.

103 Principle of legality requires the prosecutor to institute proceedings if there is sufficient evidence. the prosecutor has very limited discretion not to institute proceedings for certain petty offences. The principle of instruction imposes a duty on all officials involved in the criminal investigation, and the court, to search for the truth.

case with the prosecutor and the court and they then negotiate. For example, the defence may promise confessions on certain points in the indictment¹ in return for a sentence not exceeding a certain limit.¹⁰⁴

12.11.4 Italy

12.11.4.1 Introduction

12.11.4.1.1 Prior to 1988 Italy had a primarily inquisitorial regime governing criminal procedure. The inquisitorial system was characterised by secret, written pre-trial proceedings which were geared towards shaping the evidence at pre-trial stage with the result that the trial was a mere verification of the evidence obtained during the pre-trial investigation.¹⁰⁵

12.11.4.1.2 In 1988 the Code of Criminal Procedure was drafted. The guidelines for drafting were as follows:

- applying constitutional principles;
- complying with international rules and conventions;
- introducing an adversarial system;
- simplification of proceedings;
- principle of orality; and,
- equal treatment for the prosecution and the defence at every stage of the proceedings.¹⁰⁶

12.11.4.1.3 With the coming into force of the new 1988 **Code of Criminal Procedure** on 24 October 1988, the inquisitorial nature of criminal proceedings was changed and the essential character became adversarial. However, the 1988 **Code of Criminal Procedure** is on an on-going basis subject to important modifications either as a result of practical modifications or as a result of judgements of the Constitutional Court (Corte Costituzionale). Hence one may conclude that, despite an imposing array of rules, the field of criminal procedure in Italy is in transitional phase.¹⁰⁷ The principle of maximum simplification applies. It ensures a public hearing within a reasonable time. The public prosecutor has to complete the preliminary investigations within six months from registering of the case against the accused. Article 405-407 of the **Code of Criminal Procedure** 1988 provides for the extension of that period up to two years for reasons of acknowledged need.

104 Prof. Kuhne **Criminal Procedure systems of the European Community** at p157.

105 Professor P Corio **Criminal Procedure systems of the European Community** at p 227.

106 Professor Corio **Criminal Procedure systems of the European Community** at p 227.

107 Professor Corso Chapter 8 - Italy **Criminal Procedure Systems in the European Community** at p 223.

12.11.4.1.4 The principle of due process of law requires that the proceedings be conducted in accordance with the rules set out in the Code of Criminal Procedure.

12.11.4.1.5 The evidence collected by the prosecutor and which is in the dossier is no longer proper evidence, but only a source of evidence. The prosecution dossier may only be used at the preliminary hearing where the decision as to whether to proceed or not is made. All evidence must now be produced in court, in front of the trial judge, who must evaluate it and assess it on the basis of the initiatives of the parties and of the confrontation between them.¹⁰⁸

12.11.4.1.6 The principle of legality applies which means that the prosecutor, once he or she has come to the conclusion that there is sufficient evidence, must prosecute. They have no discretion as to whether or not they should institute proceedings. Consequently plea bargaining is not allowed other than in very limited circumstances. In practice, however, the opportunity principle is a *de facto* development as prosecutors cannot deal with all the crimes that are reported and therefore choose to investigate socially relevant crimes.¹⁰⁹

12.11.4.1.7 The preliminary investigations conducted by the police and the prosecutor are protected and secret.¹¹⁰ The person under investigation may not consult the register of suspects and has no right to be informed of the beginning and the progress of the preliminary investigation. This provision of secrecy also applies to press reporting on preliminary investigations.

12.11.4.1.8 The *incidente probatorio* is an important investigatory device. At any time prior to trial the prosecutor or defence may request the hearing of the testimony of a witness if there is a compelling reason (the need to protect a witness or to obtain evidence before a witness dies). This hearing freezes the evidence of the witness and the evidence so taken forms part of the file that the judge receives at the beginning of the trial.

12.11.4.2 **The judiciary**

12.11.4.2.1 A judge is assigned specifically to supervise all preliminary investigations. The judge determines matters such as bail and preserves the impartiality of the investigation. He or she serves as a check on the power of the prosecutor who runs the investigation.

12.11.4.2.2 The Italian code also provides for a preliminary hearing which is primarily a document

108 There are two exceptions to this rule: if there is a risk that the evidence available at the preliminary hearing may be dispersed by the of the trial. The second exception arises where a case may be settled by summary trial and penal order (this requires the consent of the accused).

109 Professor Corso **Criminal Procedure system of the European Community** at p 236.

110 Art.329 **Code of Criminal Procedure** 1988.

review by the judge. The hearing is held in camera. The prosecution also works from the investigation file and the accused may ask to be examined by the judge. This investigation file is not used in the trial by the judge and Article 431 limits the documents that may be sent to the judge for trial.

12.11.4.3 Investigating and prosecuting authorities

12.11.4.3.1 The investigating authorities consist of the public prosecutor and a specialised investigation unit known as the judicial police.

12.11.4.3.2 The judicial police are usually the first authority to deal with an offence. They are obliged to collect information about offences, even on their own initiative, and to prevent offences from having further consequences. They must take the necessary steps to protect the evidence and gather any other element that may be useful for the enforcement of the criminal law.

12.11.4.3.3 A victim's report of a crime puts in motion a process whereby the police must, within 48 hours, inform the public prosecutor of the crime and send all the information they have gathered.¹¹¹

12.11.4.3.4 The prosecutor then has to register the crime in a crime register, which in turn triggers certain time limits to complete the investigation. The public prosecutors, not the police, are in control of the pre-trial investigation with the police available to assist them.¹¹² The public prosecutor is a magistrate without any judicial power, who is directly in charge of the investigation. It is his or her task to act objectively and collect all evidence, irrespective of whether it is evidence on behalf of the prosecutor or the accused.¹¹³ Article 109 of the Constitution provides that the public prosecutor may avail himself or herself of the judicial police, who must conduct any investigation ordered or entrusted to them, and follow the prosecutor's guidelines.

12.11.4.3.5. The 1988 Code abolished the investigating judge adopting the principle that investigative and judicial functions should be separate. The successor to the investigating judge, the judge for preliminary investigations, no longer has investigating powers of his or her own. However, he or she still plays an important role, because he or she may, to a varying degree, exercise control over the investigating authorities. Another important task of this judge is when, during the preliminary investigations, and before the trial, the need arises to give evidence. Such evidence may be given to the judge for the preliminary investigations during a special adversarial hearing.¹¹⁴

111 Article 347.

112 The police have limited power to investigate crimes on their. Article 109 provides that judicial power directly allocates police power.

113 Art.358 **Code of Criminal Procedure**.

114 Professor Corio **Criminal Procedure systems of the European Community** at p 227.

12.11.4.3.6. The public prosecutor decides whether or not to prosecute an offence. The strict separation between the role of the judge and that of the prosecution and investigation is meant to ensure equal distance from the parties and parity between the parties. In the opinion of Professor Corso of Parma University the essence of the adversarial principle lies in the confrontation between the parties, each of them in pursuit of their own interest, and in their contribution to the evidence.¹¹⁵

12.11.4.3.7 Italy, like other traditionally civil law countries, is wary of broad prosecutorial discretion in deciding whether to prosecute a suspect. Article 112 of the Italian Constitution mandates compulsory prosecution. Nevertheless the Code of Criminal Procedure provides a method of disposing of weak cases.¹¹⁵

12.11.4.3.8 The Italian criminal trial is now a proceeding between the parties, precisely in order to guarantee that the prosecution and defence can participate in the proceedings under equal conditions. The prosecutor has become a party to the proceedings, since he or she has lost the substantial jurisdictional powers he or she enjoyed under the inquisitorial system.¹¹⁶

12.11.4.4 **The defence**

12.11.4.4.1 The accused is not accorded Miranda protections (which is a warning given to an accused by a police officer prior to the accused making a statement) because statements obtained through police questioning are not admissible at the trial unless defence counsel was present.¹¹⁷

12.11.4.4.2 The accused has the right to defence at any stage of the proceedings and this right may not be waived by the accused. The law does not allow the accused to defend himself or herself in person. The compulsory presence of defence counsel next to the accused is justified by the fact that the right for the accused to defend himself or herself in person may not be sufficient if he or she lacks the necessary juridical knowledge. An indigent accused's legal costs will be borne by the state. This applies to more serious crimes, but not to offences against tax laws.¹¹⁸

12.11.4.4.3 The law forbids monitoring of communications between counsel and his or her client. It also forbids intercepting correspondence and sets restrictions on searches of counsel's office. Evidence

115 Pizzi and Marfioti at p11.

116 Professor Corso **Criminal Procedure systems of the European Community** at p 229.

117 Article 350 as cited by Professor Pizzi and Marafioti **Yale Law Journal of International Law** 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' Vol.17 No. 1 1992 at 11.

118 Professor Corso **Criminal Procedure systems of the European Community** at p231-232.

collected in this way may not be used. Pending detention on remand, the accused must be given the opportunity to consult with his or her counsel privately (within sight, but not earshot). However, if exceptional circumstances exist, the public prosecutor may request a restriction from the judge for the preliminary investigation, which prohibits contact between the accused and his or her counsel, for a period of seven days.¹¹⁹

12.11.4.5 **The victim**

12.11.4.5.1 A victim or his or her close relative (if the victim has passed away as a consequence of the offence), may be an active participant in the criminal proceedings, from the pre-trial hearing to the appeal, either by bringing a private prosecution or as a party bringing a civil action.

12.11.4.5.2 In the latter case, the civil action is attached to the criminal prosecution and the victim becomes a party to the trial, but only in pursuit of his or her civil interests. The civil claim may be filed during the committal proceedings and during the trial, but not the preliminary investigation. In such a case the victim has the right to counsel and to see the dossier; he or she may file briefs and motions with the judge, has the right to be heard and present evidence, to put questions to witnesses, to be summoned to the trial, to be heard in pleadings, and is entitled to take legal remedies.

12.11.4.5.3 When the state prosecutes, the victim has the right to counsel, the right to file briefs and motions, to present evidence, to ask for further investigation, to ask the public prosecutor to hold a special hearing in respect of the evidence, to lodge objections against the request for dismissal of the charge against the accused and to be summoned to the committal proceedings (preliminary hearing) and to the trial. He or she may ask the President (presiding officer) to put questions to the witnesses and request the public prosecutor to take legal remedies. The victim may be represented in criminal proceedings by a body or an association representing his or her interests, but only with his or her consent.

12.11.4.6 **Evidence**

12.11.4.6.1 The principle of moral freedom of the individual applies. The result is that irrespective of the consent of the person concerned, no methods or techniques may be used that may influence that person's freedom of self-determination or affect their capacity to remember and to evaluate the facts.¹²⁰

12.11.4.6.2 Any evidence may be accepted by a judge provided it is useful and if it was not collected in a manner that adversely affects the moral freedom of that person.

119 Professor Corso **Criminal Procedure system of the European Community** at p 232.

120 Corso at p 237.

12.11.4.6.3 Both the prosecutor and the parties have the right to present evidence which the judge must receive unless it is evidence forbidden by law or unnecessary or irrelevant. This right has recently been severely curtailed in respect of defendants charged with organised crime.¹²¹

12.11.4.6.4 The principle of free evaluation of evidence applies. The judge must hear all the evidence and after making his or her decision give reasons of both his or her assessment of the evidence and the weight he or she allocated to it.

12.11.4.6.5 The prosecutor has a duty to search for evidence in favour of and against the accused. The prosecutor bears the onus of proof and there cannot be a conviction until the prosecutor proves guilt beyond reasonable doubt. Evidence that has been unlawfully obtained may not be taken into account.

12.11.4.6.6 The trial is now strictly adversarial. The tasks of prosecuting and judging are now strictly separated. The trial guarantees that both parties enjoy an equal opportunity to explain their point of view before an impartial judge who has not had prior access to the dossier compiled by the prosecutor.

12.11.4.6.7 All the evidence must be produced in front of the judge. The only exception is the record of unrepeatable acts. Witnesses must be heard in person and no statements may be read out in court and hearsay evidence is not permitted. There must be direct oral testimony. Witnesses and experts may consult documents to aid their memories.

12.11.4.6.8 Trials are held in public, unless the accused is a minor or the court orders otherwise for reasons of morals, hygiene, the preservation of a public secret or privacy. The judge may further order that the examination of a minor be heard in camera.¹²²

12.11.4.6.9 The parties have the right to cross-examine witnesses, experts and technical consultants.

12.11.4.6.10 The judge is passive, playing the role of the impartial audience, while the parties conduct the trial. An exception is the examination of a minor, which is led by the president of the court, who has the power to collect absolutely necessary evidence *ex officio*.

12.11.4.6.11 The adversarial system introduced in 1988 offers a maximum amount of procedural guarantees to the accused. It is, however, very costly and demanding in terms of time and personnel, as trials under the new code tend to last much longer than under the old code. If all cases were to proceed following ordinary proceedings, the judicial and prosecutorial authorities would be paralysed.@

121 Article 190bis.

122 Corso at p 240.

12.11.4.6.12 For this reason, the 1988 Code introduced special procedures which were intended to dispose of most trials. These procedures allow certain stages of the ordinary criminal trial to be skipped. They require the consent of the accused who must waive his or her right to have his or her case dealt with under the general procedures. The special categories can be broken down into further sub-categories: procedures that eliminate the preliminary hearing in the interests of expediting the case and procedures that offer an alternative to trial.

12.11.5 Summary of comparative analysis

22.11.5.1 "The problems faced by countries, regardless of the system of criminal procedure, are largely identical: a general increase in crime, lack of financial resources for the different enforcement levels (police, prosecutors, courts, prisons etc), a lack of co-ordination between the different levels or agencies, and increasing demands in respect of quality criminal proceedings. Mainly due to international Conventions and domestic legislation), slowness of proceedings, miscarriages of justice, insufficient protection for victims of crime, and for these reasons, the general public seems to be gradually losing confidence in the criminal justice system."¹²³

12.11.5.2 The difficulties faced internationally and locally in effectively dealing with crime, has resulted in a measure of doubt in the criminal justice system and led to a questioning of the criminal justice process. In consequence thereof changes have been implemented that have produced a shift away from the dominant mode of criminal procedure and so introduced concepts and procedures which are different in nature from the dominant mode of criminal procedure operating within the various jurisdictions.

12.11.5.3 It is more beneficial to heed the practical difficulties of changing large portions or entire systems (such as Italy did) from one mode of criminal procedure to another. The two different modes of criminal procedure are so embedded in the legal culture that considerably more needs to be done than simply legislating for change. These changes appear to work most effectively where whole systems are not changed, but simply certain procedures.

12.11.5.4 What does appear from the comparative analysis is that jurisdictions no longer consider themselves bound exclusively to follow one system and the changes introduced by the various countries reflect an international state of flux, transition and readiness to embrace innovations that are seen as opportunities to improve the criminal procedure systems.

12.12 Recent developments in South African law

123 Van Den Wyngaert **Criminal Procedure Systems in the European Community** Butterworths London 1993 at i.

12.12.1 Within the context of South African law, there have been a number of amendments to existing legislation as well as the introduction of new legislation which is either wholly or partly inquisitorial. These changes are attempts to meet the challenge posed by the variety of disputes facing the courts that require resolution as well as the very real concern of limited resources.

12.12.2 A few examples are put forward to provide an indication of the changing nature of our law and that enquiry type procedures are not totally unacceptable and incompatible with our law.

12.12.3 The Small Claims Court which was introduced by the **Small Claims Court Act** 61 of 1984 is inquisitorial in nature. Legal representation is specifically prohibited.¹²⁴ Section 26(1) provides that subject to Chapter 5 of the Act, the rules of evidence shall not apply in respect of the Small Claims Court proceedings and that the court may ascertain any relevant fact in such manner as it may deem fit. Section 26(3) provides that a party shall neither question nor cross-examine any other party to the proceedings. This is subject to the proviso that the presiding commissioner shall have discretion to permit any party to put a question to any other party or any witness. Further, it provides that the presiding officer shall proceed inquisitorially to ascertain the relevant facts, and to that end may question any party or witness at any stage of the proceedings.

12.12.4 The Constitutional Court's decision in **Shabalala v Attorney-General of the Transvaal**¹²⁵ introduced one of the most radical inquisitorial provisions, namely that of prosecution disclosure of certain portions of the police docket (including unused material). The decision was based on the accused's right to a fair trial.

12.12.5 Sections 153 and 170A of the **Criminal Procedure Act**¹²⁶ allows for the exclusion of the public from certain trials and the use of intermediaries. Although this conflicts with the principle that the judicial process should be conducted in such a manner that it is open to the public and the accused's right to face his or her accuser, the Constitutional Court has recognised that there are exceptions to the rule that all criminal trials should be held in open court.¹²⁷

12.12.6 Section 30 (1)-(3) of the **Restitution of Land Rights Act**¹²⁸ introduced innovative inquisitorial elements into South African law. The purpose of this Act is to provide for restitution of rights in land in respect of which persons or communities were dispossessed in terms of racially-based discriminatory

124 Section 7(2).

125 1995 12 BCLR 1593 (CC).

126 Act 51 of 1977.

127 **Nel v Le Roux** 1996 1 SACR 572 CC.

128 Act 22 of 1994.

legislation. It provides as follows:

- (1) The Court may admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law.
- (2) Without derogating from the generality of the foregoing subsection, it shall be competent for any party before the court to adduce-
 - (a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and
 - (b) expert evidence regarding historical and anthropological facts relevant to any particular claim.
- (3) The Court shall give such weight to any evidence adduced in terms of subsections (1) and (2) as it deems necessary.

12.12.7 The South African Law Commission has published a discussion paper, as part of the project on the Simplification of Criminal Procedure, which focuses on a more inquisitorial approach to criminal procedure with specific reference to police questioning, defence disclosure, the role of judicial officers and judicial management of trials.¹²⁹

12.12.8 These new provisions were designed to meet the demand to give effect to the restitution of land. If the court did not have the power to admit all evidence it thought relevant to the issue it would not be able to adequately address the problem of restitution.

12.13 Submissions received

12.13.1 Paragraph 5.5.3 of Issue Paper 10 posed questions in regard to the nature of the criminal justice system best suited to dealing with sexual offences against children. The overwhelming majority of responses indicated that the respondents were not satisfied with the current system and wished to see change that will protect children from the trauma of going to court and being cross-examined. All respondents wanted a more child-friendly room in which the child would be questioned, whether that be the court or a separate room. They also wanted training for both magistrates and prosecutors, as well as the use of intermediaries and psychologists to assist the magistrate. Many of the respondents felt that the justice system was failing child victims because of the wealth of rights that the accused enjoys.

12.13.2 Two of the respondents were in favour of a change to an inquisitorial system as it is more child friendly, but were concerned that it may be unconstitutional.¹³⁰ This concern arose from their

129 South African Law Commission **Simplification of Criminal Procedure (A More Inquisitorial approach to Criminal Procedure - Police Questioning, Defence Disclosure, The Role of Judicial Officers and Judicial Management of Trials)** Discussion Paper 96 South African Law Commission 2001.

130 Professors **C R Skyman** and **J P Swanepoel**, UNISA, Department of Criminology and Procedural Law.

interpretation of the accused's right to be tried in an ordinary court and to challenge evidence adduced.¹³¹ This assessment involves a consideration of what the terms a public trial, ordinary court and to be present mean.

12.13.3 At a lecture at Justice College in September 1999 presented by the South African Law Commission, the prosecutors attending were unanimous that most of the problems with the sexual offence trials arise because the rules of evidence are too restrictive, and that if those rules were changed, the conviction rate would improve dramatically.¹³²

12.14. Evaluation

12.14.1 We do not regard it as useful to proceed to refer to the two modes of criminal procedure as separate distinct systems in opposition to one another. This distinction is anachronistic and serves only to alienate persons in favour of one system from those in favour of the other. The division between the two systems generates remarkably high feelings (almost of national patriotism) and a need to demonstrate that one system is stronger or more efficient, more in use than the other.

12.14.2 Both adversarial and enquiry type systems have advantages and disadvantages. Discussions as to which is better than the other almost invariably focus on one single aspect of each system, rather than an appraisal of the system as a whole, and are therefore misleading and unhelpful. On a detailed analysis, most of the advantages and disadvantages of each system are readily identifiable. The overall effect of those disadvantages and advantages on the quality of justice though, is less easy to identify or address.¹³³

12.14.3 We need to move away from labelling one system as opposed to another and rather consider what the needs are that have to be met, whether new procedures will be effective and whether they are constitutionally sound. It is important to remember that every system, including South Africa's, is constantly evolving.

12.14.4 The criminal justice system is not an end in itself. It exists to satisfy the needs of society. Those needs need to be identified. In the context of sexual offences, the need for an effective system of justice that brings perpetrators to book and protects innocent suspects from wrongful conviction is essential, as is the respectful treatment of all witnesses in court. There is inestimable value in the litigant feeling that he

131 Section 35(3)(c) Every accused has a right to a fair trial, which includes the right a public trial before any ordinary court and subsection (e) to be present when tried.

132 Lecture by D Clark and C Kimble (researchers of the south African Law Commission) at the Justice College, Pretoria, 17 September 1999.

133 The Law Reform Commission of Western Australia **Review of the Criminal and Civil Justice System in western Australia** Project 92 June 1999 at

or she has had reasonable opportunity to present his or her case and that he or she has been listened to@.¹³⁴

12.14.5 It is safe to say that the courts have not been able to meet those needs. The low number of sexual offences that are reported and the low number of convictions has created serious doubt in the minds of the community of the ability of the criminal justice system to act effectively against this phenomena.

12.14.6 This has enormous implications for the survival of a peaceful and ordered society for as the courts fail, so private resolution of disputes and private justice by retribution become real risks.

12.14.7 The Commission aims to draft legislation that will both minimise the trauma of victims of sexual assault and improve the quality of evidence, increase respect for the rights of the accused and assist the decision-making process of the trial courts. A determination needs to be made to assess in what ways the system is failing complainants and victims and what can be done to remedy that, given South Africa's human and financial resources.

12.14.8 The case studies, personal stories and highly publicised personal accounts of the secondary trauma suffered by victims, *inter alia*, as a result of secondary trauma caused by the justice process are legion. The trauma falls into two categories: those that are physical and those that are a result of structural processes.

12.14.9 The physical aspects include: the victim having to share the same waiting room as the accused and his or he family; having to consult with the prosecutor in an office shared by a number of other officials; lack of refreshments for victims waiting to give evidence; that the court buildings and their interiors are alienating and not child friendly; lack of screens and audio visual equipment to allow the child victim to give evidence in a room adjacent to the court; that witnesses, including the victim, often have to travel long distances to court (frequently in police vans) and unsympathetic court officials.

12.14.10 Many prosecutors took the initiative and established separate waiting rooms, obtained donations from local business to take the steps necessary to ameliorate the additional suffering experienced by victims. On a national scale, the Department of Justice has raised funds from the Canadian Embassy to fund the roll-out of at least 20 sexual offence courts during 2000. A major part of those funds is to be dedicated to putting in place structural improvements to court buildings and training of justice officials. This section of the paper will not deal with recommendations in that regard.

12.14.11 This Chapter has highlighted aspects of the two major modes of criminal procedure. The

134 The Law Reform Commission of Western Australia **Review of the Criminal and Civil Justice System in western Australia** Project 92 June 1999 at p 5.

references to problematic court processes are a background to isolating which of those processes should be considered for change to be more effective in protecting victims from further unnecessary suffering and will increase the likelihood of securing more accurate court decisions.

12.14.12 In South Africa the Constitution guarantees a phalanx of rights to the accused: the right to remain silent, the right not to be compelled to make any confession, the right to be presumed innocent, the right to be assisted by a legal representative, the right to have access to portions of the police docket, the right to a fair trial, the right to equal protection and benefit of the law, not to be detained without trial, not to be tortured, the right to all information the State may have in a case against him or her.¹³⁵ There is currently no reciprocal duty of defence disclosure.

12.14.13 This emphasis on the rights of the accused must be understood in the context of South Africa's history. Out of this history, together with the local and international move to a human rights based culture, developed a strong, and frequently justified, emphasis on protecting an accused from wrongful incarceration and ensuring the right to a fair trial.

12.14.14 In the process, however, the rights of victims of crime seem to have been subordinated in an attempt to ensure that suspects or accused are not subjected to the abuses of the past.

12.14.15 Prior to making any recommendations it is necessary to mention briefly whether it is possible and desirable to have different rules of evidence and procedure for different courts. This question was addressed in some detail by the Hoexter Commission in considering the type of procedure that was to be introduced in the Small Claims Court.¹³⁶ The Hoexter Commission was of the opinion that it was feasible for different courts to have different rules of evidence and procedure as the Small Claims Court was designed to deal with certain problems. If the same rules applied, the entire purpose and advantage of the court would be undermined. The procedural rules exist for the community - not the other way round.¹³⁷

12.14.16 That leads to the question of what problems the Sexual Offence Courts are being designed to overcome and if those objectives can be reached within the current legal paradigm. It is abundantly clear that the current system of criminal procedure is partly responsible for the inability to deal effectively with sexual offences. The general nature of the problems that are hoped to be overcome are: better quality of police investigation; greater commitment of justice officials; specialisation of court officials; trials in which all facts are put before the court; greater understanding for the victim where they do not feel that they are simply a witness; a more efficient process in respect of both more accurate decisions and speedier trials;

135 Chapter 2 of the **Constitution of the Republic of South Africa**, Act 108 of 1996.

136 Commission of Enquiry into the Structuring and Functioning of the Courts.

137 Van Niekerk, Van der Merwe & Van Wyk **Privileges in die Bewysreg** (1984) at 8 cited by Schwikkard et al at p 8.

confidence in the criminal justice process and ultimately, sentences that will deter, rehabilitate offenders and ensure community protection.

12.14.17 The present South African system is a hybrid system of criminal procedure. Although largely adversarial it nevertheless has numerous inquisitorial elements within it. The Commission recognises that in relation to sexual offences there certainly is a need to revise various rules of evidence and procedures. The Commission does not propose to change the entire mode of criminal procedure as it pertains to sexual offences. The issue is how to make the present system work better.

12.15 **Recommendations**

12.15.1 The Commission recommends that insofar the undermentioned rules of evidence and procedure listed below pertain to sexual offences they must be assessed in a manner that takes account of the current problems experienced as well as possible new provisions to solve the difficulties (which may either adversarial, inquisitorial in nature or a combination thereof):

- 1. Cross-examination: the current rules, their efficacy and cross-examination of the victim by the accused personally;**
- 2. obligatory use of an intermediary in the case of certain witnesses;**
- 3. protective measures: those currently available in the Criminal Procedure Act 51 of 1977 and the possibility of new measures;**
- 4. the viability of the introduction of victim representation;**
- 5. introduction of different verdicts;**
- 6. defence disclosure and production of personal records;**
- 7. methods to encourage the accused to participate in the trial: plea bargaining and diversion;**
- 8. the abolition of the cautionary rules in sexual offence cases;**
- 9. disallowing the evidence of previous sexual history of the complainant;**
- 10. allowing expert evidence in sexual offence cases;**
- 11. admitting previous consistent statements;**

12. **allowing hearsay evidence of children;**
13. **considering the competence requirements before a witness is allowed to testify and the necessity of corroborating unsworn evidence; and**
14. **admitting similar fact evidence.**

CHAPTER 13

TERRITORIAL OPERATION AND JURISDICTION

13.1 Introduction

13.1.1 Jurisdiction is the extent of a court's power to entertain a matter or hand down a sentence. It may take many forms, for example: geographical, over persons residing or being within the area of jurisdiction of the court, foreign judgments, immovable property: or it may relate to the nature of the cases the court may entertain or the limits of the sentence it may impose.

13.1.2 The courts have consistently accepted that the doctrine of effectiveness, that is the power of the court to give an effective judgment, is the basis of jurisdiction.¹

13.1.3 The question of extra-territorial jurisdiction is important in cases where a sexual offence has been committed as these offences are committed by or against South Africans in other jurisdictions. Further, this has particular significance for child victims of sexual offences due to problems that children have in regard to memory in terms of time and place.²

13.2 Current law

The following legislative provisions determine jurisdiction in South African courts:

- Section 2 of the **Magistrates Court Act** 32 of 1944 (hereinafter referred to as the **Magistrate=s Court Act**) authorises the Minister of Justice to establish districts and courts.
- Section 19 of the **Supreme Court Act** 59 of 1959 provides, *inter alia*, that a provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction.

1 **LAWSA** Vol 11 p 343 First Reissue Butterworths Durban 1998.

2 See clause 26 (1) - (4) of the draft Bill which deals with extra-territorial jurisdiction.

- Section 89 of the **Magistrate=s Court Act** provides that a court, other than a regional court, has jurisdiction over all offences except treason, murder and rape. The regional court also has jurisdiction over murder and rape.
- Section 90 of the **Magistrate=s Court Act** provides, subject to section 89, *inter alia*, for the extension of geographical jurisdiction of the magistrate=s court and regional court in certain circumstances. (For example, offences committed on board any vessel on a voyage within the territorial waters of South Africa).³
- Section 92 of the **Magistrate=s Court Act** sets out the limits of jurisdiction in the matter of punishments.
- Section 94 of the **Criminal Procedure Act** 51 of 1977 provides for the charging of an accused in one charge with the commission of an offence, on diverse occasions, in respect of any particular person.
- Section 110 of the **Criminal Procedure Act** 51 of 1977 provides that if an accused person is brought before a court which lacks jurisdiction and the accused fails to plead lack of jurisdiction, that court will be deemed to have jurisdiction in respect of the offence in question.
- Section 157(1) of the **Criminal Procedure Act** provides for the joinder of accused in the same criminal proceedings at any time before any evidence has been led. Subsection (2) provides for the separation of trials, on request of the State or the accused, when two or more persons are charged jointly whether for the same offence or different offences. The decision whether to grant a separation of trials is a discretionary matter and the main test in deciding whether to grant a separation of trials is whether the applicant will suffer prejudice if a joint trial takes place.⁴
- Sections 111(1)(a) and (3) of the **Criminal Procedure Act** empowers the National Director of Public Prosecutions (NDPP) to move a trial to the jurisdiction other than the one in whose the criminal act was committed. Du Toit et al state that this section is

3 Section 90 (2)(e).

4 Du Toit et al **Commentary on the Criminal Procedure Act** at 22-14.

usually only applied if the NDPP is of the opinion that it is in the interests of justice that multiple criminal acts committed in different jurisdiction areas should be judged during a single trial or where there is a risk of riots.⁵

13.3 **Problem statement**

13.3.1 A practical problem arises when an accused commits a number of offences against a particular victim in a number of jurisdictions. The prosecution will usually charge the accused in terms of section 94 of the **Criminal Procedure Act**.⁶ However, it may be difficult to establish which particular court should hear the matter where more than one court have jurisdiction. Currently, to clarify which court should hear the case, the State brings a centralisation application in terms of sections 111(1)(a) and (3) of the **Criminal Procedure Act**. This is a formal process and sometimes delays proceedings unnecessarily.

13.4 **Evaluation and Recommendation**

13.4.1 The Commission is of the opinion that it is of the utmost importance to take all necessary steps to ensure access to the courts and justice.

13.4.2 A number of new ideas have been introduced in recent legislation which have a bearing on the development of jurisdiction. The first important change was brought about by the **Domestic Violence Act** 116 of 1998. The Act extends the jurisdiction of the court to include complainants who are temporarily residing in its jurisdiction,⁷ it requires no specific minimum period of residence or employment,⁸ and any protection order that the court may make is enforceable throughout the Republic.⁹

13.4.3 A second possible change is mooted in the Report of the South African Law

5 Du Toit et al **Commentary on the Criminal Procedure Act** at 16-5.

6 Section 94 of the **Criminal Procedure Act** 51 of 1977 provides for the charging of an accused person on diverse occasions.

7 Section 12 (1).

8 Section 12 (2).

9 Section 12 (3).

Commission on Juvenile Justice.¹⁰ In the said Report it is recommended that, to enable the cost effective functioning of the One-Stop Centres for children who commit crimes, legislation should be enacted that complements the **Magistrate=s Court Act** to allow such centres to hear cases where the offence was committed outside the boundary of the relevant proclaimed magisterial district.

13.4.4 The doctrine of *causae continentia* has long been a part of our law. The underlying consideration of this doctrine is set out by Steyn CJ as being the avoidance of a multiplicity of processes and the possibility of conflicting judgments on the same cause of action, as well as the more convenient manner in which to dispose of cases.¹¹ This is a civil doctrine, but has found application in various forms. The first is the facilitation of acceptance of this principle by the provision of section 26(1) of the **Supreme Court Act** that renders processes and judgments of a Division effective beyond the area of jurisdiction.¹²

13.4.5 The second application is in section 157 of the **Criminal Procedure Act** 51 of 1977 which essentially confers jurisdiction to both join and separate trials.

13.4.6 Dodson J¹³ eloquently puts the doctrine of *causae continentia* to effect in the case of **Hlatsawayo & others v Hein**¹⁴ by focussing on the underlying rationale of the doctrine that requires that the same court deal with all inter-related aspects of a suit notwithstanding that the jurisdiction in respect of some components would be questioned if they stood alone. Further, that a court should have all the ancillary powers necessary or reasonably necessarily incidental to the performance of its functions in terms of the Act.

13.4.7 In lay terms, the doctrine allows the court to entertain cases that should properly be before it based on considerations of convenience and common sense.

13.4.8 It is clear to the Commission that the technical provisions relating to jurisdiction

10 South African Law Commission **Report: Juvenile Justice** July 2000 Project 106.

11 Per Steyn CJ in **Roberts Construction Co Ltd v Wilcox Brothers (Pty) Ltd** 1962 (4) SA 326 (A); **Majola v Santam Insurance Co Ltd & others** 1976 (1) SA 874 (SE) at 876H.

12 Per Trollop JA in **Estate Agents Board v Lek** 1979 (3) SA (A) at 1063.

13 As he then was.

14 1999 (2) SA 834 (LCC) at 884.

should not hinder the State in the presentation of its case so as to result in a miscarriage of justice by the acquittal of guilty persons¹⁵ or to make the presentation of the case logistically impossible for the State to manage. At the same time the provisions creating or conferring jurisdiction should not result in the accused being legally prejudiced.

13.4.9 However, as this issue is clearly one involving simplification of our criminal procedure **the Commission recommends that it be referred to the South African Law Commission Project on the Simplification of criminal procedure for further investigation.**

13.5 Recommendation

1. **The Commission recommends referring the jurisdictional problems that arise in relation to multiple offences or multiple offenders or complainants in different jurisdictions to the South African Law Commission Project on the Simplification of Criminal Procedure.**

15 This reasoning is cited by Du Toit et al **Commentary on the Criminal Procedure Act** at 22-14 when referring to the exercise of discretion in relation to the separation of trials.

CHAPTER 14

PRESCRIPTION

14.1 Introduction

14.1.1 Prescription¹ refers to either the acquisition or the extinction of a right by the lapse of time. The length of time differs depending on the nature of the claim. Prescription is intended to bring an end to disputes and to create legal certainty. If a claim has prescribed, in effect it means that the merits are not considered and although there may be a claim, the lapse of time excludes prosecution or civil liability.

14.1.2 Prescription problems can arise because of the difficulties that the victims of sexual abuse have in mounting legal proceedings until many years after the events in question.² These problems are summarised by the Report of the Ontario Limitations Act Consultative Group as follows:³

[I]t is now recognised that in some circumstances the sexual assault will render the victim incapable of considering legal proceedings until many years after the event. These circumstances typically involve victims who were in a relationship of trust and dependency. Incest is a prime example, but recent experience reveals that other sexual abuses in relationships of trust have similar effects. A number of factors combine in these situations to render the victim incapable of initiating legal proceedings against the perpetrator: the nature of the act (personal violation), the perpetrator's position of power over the victim and the abuse of that position act effectively to silence the victim. Moreover, until recently, many victims of sexual assault were subject to social disapproval based on the perception that they were somehow to blame. In these circumstances, it is not uncommon for such a victim to cope with the violation by dissociating from the assaultive events, so that they are forgotten altogether or their emotional significance is denied. Many years of therapy may be required before the victim is able to confront the assailant. Where a victim was also physically, mentally or psychologically disabled at the time of the assault, another incapacitating factor is added

¹ Prescription is sometimes discussed under the heading >Limitation of actions=.

² See also A C L Mullis >Compounding the abuse? The House of Lords, childhood sexual abuse and limitation periods= (1997) 5 **Medical LR** 22, 26; Joanne Conaghan >Tort litigation in the context of intra-familial abuse= (1998) 61 **Modern LR** 132; Nicholas J Mullany >Civil actions for childhood abuse in Australia= (1999) 115 **Law Quarterly Review** 565; J M T Labuschagne >Deliktuele eis vir genoegdoening weens seksuele misbruik en verkragting van >n kind= 1999 **Obiter** 427, >Tydsverloop, omstandigheidsverjaring en seksuele misbruik van kinders= 1996 **Obiter** 328.

³ Ontario Report (1991) 20.

to those above.

14.1.3 For our purposes, two aspects related to prescription are relevant. The first is the prescription of crimes that prevents the State from charging an accused. The second is prescription of a civil debt arising out of a sexual offence.

14.2 Prescription of crimes

14.2.1 Section 18 of the **Criminal Procedure Act** 51 of 1977 makes provision for the prescription of the right to institute a prosecution.⁴ With the exception of murder, treason (in certain circumstances), robbery - if aggravating circumstances were present, kidnapping, child-stealing or rape, all other offences shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed. Those offences exempted in section 18 never prescribe.

14.2.2 Prescription is suspended by the institution of a prosecution.⁵

14.3 Prescription of a civil debt arising from the commission of a sexual offence.

14.3.1 The law limits the time within which victims can sue after they have been injured. Once the applicable time limit, known as a >limitation period= or >prescription period= has expired, the action cannot proceed. In respect of most debts,⁶ the delay within which a person must commence a civil action is three years.⁷ Special rules apply to minors who have suffered damages. The limitation period is suspended, and does not begin to run until the minor has reached the age of majority.⁸ Even so, limitation periods can be a significant barrier to those

⁴ The exemptions to the 20 year prescription period previously were linked to those offences for which the death penalty could be imposed. After the death penalty was declared unconstitutional and the as a result of the judgment in **S v De Freitas** 1997 (2) SA 204 (C) section 18 was amended.

⁵ A prosecution is instituted by the issuance of summons, not the service thereof. See **R v Magcayi** 1951 (4) SA 356 (EDL).

⁶ See section 11 of the **Prescription Act** 68 of 1969. Prescription is also governed by other legislation that limits the time period in which a claim may be made against the State for liability arising out of the actions of its officials.

⁷ Section 11(d) of the **Prescription Act** 68 of 1969.

⁸ Sections 3(1)(a) [postponement of prescription] and 13(1)(a) [delay of prescription] of the Prescription Act 68 of 1969.

who suffer abuse, particularly sexual abuse, as children.

14.3.2 In spite of increased awareness of the problem of child sexual abuse, there was no immediate realisation that redress might be sought by means of civil action against the perpetrator or other persons responsible. However, in the mid-1980s civil suits for child sexual abuse began to be brought in the United States, and limitation problems were encountered and, for the first time, discussed in legal literature.⁹ In England, the first civil action for rape was brought in 1986,¹⁰ but **Stubbings v Webb**¹¹ was the first English case to raise limitation issues in a sexual abuse context. In Canada, the first case in which such limitation issues appears to have been raised was **Gray v Reeves**¹² in British Columbia in 1992, while the Supreme Court of Canada dealt with these problems for the first time in **KM v HM**¹³ later in the same year. In New Zealand, the first decision appears to be **S v G**¹⁴ in 1994. As far as could be ascertained, there are no reported cases dealing with prescription issues in a sexual offence context in South African law.

14.3.3 A claim for damages based on sexual abuse will in the ordinary course prescribe after three years of that child reaching the age of majority, i.e. after that victim=s twenty fourth birthday. This makes it important to know when prescription will begin to run.

14.3.4 Section 12 of the **Prescription Act 68 of 1969** states:

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the

⁹ The first US article appears to be M G Salten >Statutes of limitation in civil incest suits: Preserving the victim=s remedy= (1984) 7 **Harvard Women=s LJ** 189.

¹⁰ **W v Meah** [1986] 1 All ER 935.

¹¹ [1993] A C 498.

¹² (1992) 89 DLR (4th) 315.

¹³ (1992) 96 DLR (4th) 289.

¹⁴ [1995] 3 NZLR 681.

identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

14.3.5 The problem is that most victims of childhood sexual abuse are not conscious of the damage suffered and its probable cause (>the facts from which the debt arises=) or may only become aware of these much later in life.

14.4 **Comparative review**

14.4.1 **Australia**

14.4.1.1 The Law Reform Commission of Western Australia gave careful consideration to the question of whether a plaintiff who brought an action for sexual abuse by a person in a position of trust would be unfairly defeated by the application of the ordinary limitation rules which it proposed, or whether there should be special provision for child abuse cases.¹⁵ The Commission concluded that a special rule was not necessary because the discovery limitation period would not start to run until a plaintiff was in possession of all the relevant information and because, if the ultimate limitation period expired, the plaintiff would be able to apply to the court for an extension under the exercise of the court=s discretion. It observed:¹⁶

It is true that plaintiffs may be under some slight disadvantage in that they will have to persuade the court to exercise its discretion in their favour, rather than being entitled to proceed as of right, but as against this, the discretion solution can deal fairly with the problems involved and avoids the need to create a rule special to a particular class of plaintiffs. A further advantage of the discretionary extension is that the court retains the flexibility to deal with cases which do not fit the paradigm, for example where the plaintiff has unreasonably delayed, or the defendant has been significantly prejudiced by loss of evidence.

14.4.4.2 In a similar manner the Queensland Law Reform Commission¹⁷ recommended that claims for childhood sexual abuse or domestic violence should not be specifically excluded from the general scheme, but should be dealt with by the exercise of judicial discretion.

¹⁵ Law Reform Commission of Western Australia Project No 36 Part II: **Report on Limitation and Notice of Actions** (January 1997) par 9.43 et seq.

¹⁶ Par 9.44.

¹⁷ **Report No 53: Review of the Limitation of Actions Act 1974 (Qld)** (September 1998) 160.

14.4.2 Canada

14.4.2.1 Following the report of the Ontario Limitation Act Consultation Group in 1991, a Bill was introduced in Ontario. This Bill dealt with the problem of sexual abuse by introducing three special provisions. First, there were to be no limitation period in a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether or not financially.¹⁸ Sexual assault was defined in the Bill as an assault which is committed in circumstances of a sexual nature, to the extent that the sexual integrity of the victim is violated, and included not only incest and rape but also any non-consensual intentional touching in circumstances of a sexual nature.

14.4.2.2 For reasons already discussed, in circumstances such as these the victim may well be rendered incapable of considering legal proceedings until many years after the event. The Ontario Limitation Act Consultation Group thought it inappropriate that any limitation period should apply to such claims, for the following reasons:¹⁹

To impose a limitation period on actions for sexual assault in a relationship of trust or dependency is to reward assailants who have most effectively traumatised and silenced their victims. Clearly, the public interest does not require that immunity from liability be extended to those assailants.

One of the purposes of limitation periods is to discourage parties from giving vent to old disputes. However, in these cases, it appears that public policy with respect to incest and other sexual assaults demands that old disputes be allowed to proceed in order to provide relief for the victim and to deter abusers. Indeed, for criminal prosecution of this conduct, there would be no limitation period.

Another reason for limitation periods is the loss of evidence by an unsuspecting defendant while the undisclosed plaintiff waits until he or she has collected sufficient

¹⁸ (Ont) Limitations Bill 1992, clause 16(h).

¹⁹ Ontario Report (1991) 20 - 21.

evidence. However, in these situations the defendant is unlikely to be prejudiced by the loss of evidence, since it is his or her sexual conduct that is in issue. Indeed, it is the plaintiff who is more likely to face evidentiary problems, because the assault will often have taken place when the plaintiff was young or otherwise vulnerable.

Similarly, the plaintiff is unlikely to delay beyond the first point at which he or she can bring the action since bringing the claim is often essential to the healing process.

14.4.2.3 Secondly, for claims of sexual assault which occur other than in relationships of trust or dependency as defined above, and for claims of non-sexual assault in relationships of trust and dependency, the Bill created a rebuttable presumption that the plaintiff was >incapable of commencing the proceedings because of his or her physical, mental or psychological condition= until the proceeding was in fact commenced. Neither the discovery period nor the ultimate period would run during any such period of incapacity.²⁰

14.4.2.4 The Ontario Report comments:

In such circumstances, it does not seem unreasonable to assume that most victims will be unable to commence civil proceedings within two years of the attack. The focus should be on the validity of the claim, and not on the condition of the plaintiff. Thus, instead of compelling every victim to prove inability to pursue the claim, the limitation period should be postponed unless the defendant can prove that the victim was capable of bringing the proceedings within the relevant two-year limitation period.

14.4.2.5 Finally, while the proposals in the Bill were generally only to apply to acts or omissions that occur before the new legislation was to come into force if the limitation period that would otherwise apply has not expired, the above two provisions would have been fully retrospective, so that once the legislation came into force they would apply to all cases no matter how long ago the acts of sexual abuse took place.²¹

²⁰ (Ont) Limitations Bill 1992, clause 9(1) (discovery period); clause 15(7) (ultimate period).

²¹ (Ont) Limitations Bill 1992, clause 23(7). See Ontario Report (1991) for the justification for allowing the provisions on sexual abuse cases to have retrospective effect.

14.4.2.6 Although the proposed 1992 legislation in Ontario has not been enacted,²² three other Canadian provinces have implemented changes to their limitation legislation in relation to claims for childhood sexual abuse. In British Columbia and Saskatchewan, the amendments abolish limitation periods in cases of misconduct of a sexual nature occurring while the plaintiff was a minor. In Prince Edward Island the legislation goes further, removing the limitation period in all cases of sexual misconduct and in all cases where injury occurred in the context of a relationship of intimacy or dependency.²³

14.4.3 England

14.4.3.1 In England, the Law Commission expressed the provisional view that claims for childhood sexual abuse should be subject to special rules only if the general scheme could not adequately provide for them.²⁴ The Law Commission concluded that the application of a discoverability test to claims by sexual abuse victims would resolve many of the problems which the accrual system can cause in this area.²⁵ It acknowledged that, in the absence of a judicial discretion to extend the limitation period, the imposition of an ultimate limitation period or >long-stop= period might lead to harsh results. However, it remained of the view that the benefits of a long-stop period would outweigh the disadvantages.

14.4.3.2 The Law Commission=s provisional recommendation was that the general scheme (in essence, three years from discoverability with a long-stop of thirty years from the date of abuse, with postponement for minority or adult disability) should apply to claims by

²² However, see now (Ont) Bill 163 (2000): An Act to revise the Limitations Act which (again) provides for special rules for claims based on assault and sexual assault. Clause 10 of this Bill states that the basic limitation period does not run while the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition. A person who has a claim based on assault and who, at the time of the assault, had an intimate relationship with or was dependent on one of the parties to the assault, is presumed (until the contrary is proved) to have been incapable of commencing the proceeding earlier than it was in fact commenced. A person with a claim based on sexual assault is presumed (unless the contrary is proved) to have been incapable of commencing the proceeding earlier than it was commenced.

²³ Law Commission of Canada **Restoring Dignity: Responding to Child Abuse in Canadian Institutions** (March 2000) 152; Queensland Law Reform Commission **Report No 53: Review of the Limitation of Actions Act 1975 (Qld)** (September 1998) 153.

²⁴ Law Commission **Consultation Paper No 151: Limitation of Actions** (October 1997) 333.

²⁵ Ibid 334.

victims of sexual abuse.

14.5 Evaluation and recommendations

14.5.1 Prescription of the right to institute criminal prosecutions appears not to be problematic, as very serious offences such as rape never prescribe. Practical considerations such as the loss of evidence due to the delay in bringing a prosecution present greater difficulties. However, if our recommendation regarding the redefinition of >rape= as proposed in the draft Bill contained in this Discussion Paper is accepted, then the question will arise whether it is necessary to include the redefined offence of >rape= under the exceptions listed in section 18 of the **Criminal Procedure Act 51** of 1977. We would naturally argue for such inclusion.

14.5.2 We do realise, however, that in practice a successful prosecution in a criminal matter (say, for instance, a case of reckless driving) considerably improves the chances for success for the victim in his or her subsequent claim for damages against the person convicted of reckless driving in the criminal trial. Civil litigants therefore often wait for the outcome of the criminal trial before proceeding with a civil claim.

14.5.3 In the case of childhood sexual abuse it might not be prudent to rely too much on the outcome of a criminal trial, if there is going to be one, which in itself might be a doubtful event. It is worth remembering also that some victims consciously do not want to follow the criminal route.

14.5.4 This still leaves victims with the option of a civil claim. In such proceedings the victim has far greater control over the conduct of the case (the victim is usually the claimant and a party to the case) and another standard of proof applies: While the State has to prove all the elements of the crime beyond a reasonable doubt, the burden of proof in civil matters is that of a balance of probabilities. It is in this context that problems with prescription can and will arise.

14.5.5 We appreciate that generally limits on the time for instituting action is intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce a right or rights and that its imposition has been justified on a number of grounds based on fairness, certainty and public policy.²⁶ However, a limitation period should not be seen as an arbitrary cut-off point unrelated to the demands of justice or the general society. >It represents

²⁶ Queensland Law Reform Commission **Review of the Limitation of Actions Act 1974(QLD)** Report No 53 September 1998.

the legislature=s judgement that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated=.²⁷

14.5.6 Contrary to the international trend, the Project Committee is of the opinion that victims of sexual abuse should not be subject to the ordinary prescription rules, but to special rules. Although section 12(3)²⁸ of the **Prescription Act 68 of 1969** is arguably wide enough to cater for sexual abuse, the suppressed memory syndrome, and the delays and fragmentation typical in disclosure of sexual abuse, etc., we believe it would do no harm to remove any uncertainties by including specific provisions regarding the prescription of sexual abuse cases in the **Prescription Act 68 of 1969**. Accordingly we recommend amending section 12 of the **Prescription Act 68 of 1969** by inserting three subsections to provide (a) that the basic limitation period does not run while the person who has a claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition, (b) that the person who has the claim is presumed to have been incapable of commencing the proceeding earlier than it was in fact commenced because of his or her dependence on or intimate relationship with the defendant, and (c) that the person who has a claim based on sexual abuse is presumed to have been incapable of commencing the proceeding earlier than it was commenced.

14.5.7 Therefore we recommend:

(1) **Amend section 12 of the Prescription Act 68 of 1969 by the substitution of subsection (3) with the following:**

(4) Prescription shall not commence to run in respect of a debt based on sexual abuse during the time in which the creditor is unable to institute proceedings because of his or her physical, mental or psychological condition.

(5) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was

²⁷ Per McHugh J in **Brisbane South Regional Health Authority v Taylor** (1996) 186 CLR 541 at 553.

²⁸ See paragraph 1.3 above.

actually instituted if at the time of the abuse one of the parties to the abuse had an intimate relationship with the creditor or had been someone on whom the creditor was dependent, financially or otherwise.

(6) Unless the contrary is proved, a creditor to whom a debt based on sexual abuse is due shall be presumed to have been unable to institute proceedings earlier than it was actually instituted.

14.5.8 In addition consideration must be had to the various statutes that regulate the institution of claims against the State or state organs by reason of the actions of their employees. In actions against members of the police²⁹ or the Defence Force,³⁰ shorter limitation periods do apply. However, the constitutional validity of these latter provisions are questionable in view of the Constitutional Court judgement in **Moise v Transitional Local Council of Greater Germiston and Others**.³¹ This case involves section 2(1)(a) of the **Limitation of Legal Proceedings (Provincial and Local Authorities) Act** which requires that a local authority be given written notice of intention to institute legal proceedings within 90 days as from the day on which the debt became due. The Constitutional Court held that this provision constitutes a material limitation of an individual's right of access to a court of law under section 34 of the Constitution and is unconstitutional.³² No recommendations are made in this regard and we suggest that this should form the subject of another investigation.

²⁹ See section 32 of the **Police Act** 7 of 1958. See also Anton de Klerk >Skuldlose aanspreeklikheid en die statutêre verkorting van verjaringstermyne= 2000 (3) **TSAR** 566.

³⁰ See section 113 of the **Defence Act** 44 of 1957.

³¹ 2001 (8) BCLR 765 (CC).

³² Per Somyalo AJ at 766.

CHAPTER 15**PRE-TRIAL PROCESSES****15.1 Introduction**

15.1.1 In order to realise the strive towards reducing delays and the expeditious completion of sexual offence trials, whilst at the same time endeavouring to avert further trauma to the complainant of a sexual offence, the Commission has made recommendations¹ regarding the development of sexual offence management protocols which outline the roles, functions and responsibilities of the various role-players involved in the management of sexual offences. A supplementary recommendation flowing out of these protocols is joint intervention and the establishment of joint investigation teams in serious sexual offence cases headed by prosecutors.² The necessity of adopting case-flow management techniques has also been advocated in order to reduce delays and increase efficiency. The unfolding of the course of events prior to the commencement of the trial will in effect map the sequence and subsequent success of a trial. The pre-trial processes are centred around and in fact pre-determined by the amount of planning undertaken by the prosecutor or lack thereof, prior to, during and following the prosecutor exercising his or her discretion to prosecute.³ The recommendations relating to juvenile offenders contained in the South African Law Commission Report on Juvenile Justice⁴ are supported and will therefore not be dealt with in this chapter. This chapter addresses the pre-trial processes in relation to adult offenders.

15.1.2 The importance of the role of the prosecutor is based on the fact that only the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings, including the power to discontinue criminal proceedings.⁵ It is entirely within the discretion of the prosecutor to proceed with any prosecution, and on the charge that he or she deems appropriate. The

¹ See Chapter 2 above.

² See Chapter 4 above.

³ See Chapter 3 above for an exposition of the role and function of the public prosecutor in sexual offence matters.

⁴ SA Law Commission Project 106 Juvenile Justice Report July 2000.

⁵ Section 6 of the **Criminal Procedure Act**.

basic criteria for the decision to institute a prosecution is, firstly, that sufficient, admissible evidence should be available to “provide a reasonable prospect of a successful prosecution.”⁶ In the absence of a reasonable prospect of a conviction, a prosecution will not be pursued - the initial consideration being the adequacy of the evidence. The second criterion is that a prosecution should normally follow if there is sufficient evidence for a conviction “... unless public interest demands otherwise.” A prosecutor is not obliged to institute a prosecution whenever sufficient evidence is available.⁷ The factors that are involved basically centre on the triad of factors involved in sentencing, namely the seriousness of the offence, the circumstances of the offender and the interests of society.

15.1.3 With the above in mind, the advantages and disadvantages of various pre-trial processes will be discussed in this chapter.

15.2 Multi-disciplinary consultation

15.2.1 The NDPP Policy Directive make reference to the advantages of a co-ordinated multi-disciplinary and victim-centred approach. It states that the investigation and prosecution of sexual assault cases can be enhanced by a co-ordinated multi-disciplinary approach. The Commission interprets the aforementioned multi-disciplinary approach to include procedures following up to and commencing after the decision is made whether or not to prosecute.

15.2.2 Depending on the complexity of any given case it may or may not be necessary to convene a multi-disciplinary consultation team in order to decide whether or not to prosecute. In this context a multi-disciplinary consultation is an informal meeting between various role-players primarily responsible for the investigation. The role-players, aside from the prosecutor and the investigating officer, at this initial meeting will of necessity vary to meet the requirements of each case. In some cases a consultation between the prosecutor and the investigating officer might suffice, while in others an expert who has assessed a child victim or a person who is skilled in interpreting the ability of a victim to communicate (verbally and non-verbally) may be requested to be present to explain whether or not a child or mentally disabled

⁶ National Prosecuting Authority of South Africa Prosecution Policy (2000) 3.

⁷ SA Law Commission **Discussion Paper 94**: Simplification of Criminal Procedure (Sentence Agreements)(2000) 15, 19; Johann Kriegler **Hiemstra: Suid Afrikaanse Strafproses** 5 ed (1993) 10 -11 as quoted in the SA Law Commission Discussion Paper 100.

victim is able to testify. The role-players should be determined by the circumstances of each case. Even if guidance is not needed for the prosecutor to make this important decision, guidance as to how the case should be dealt with will certainly be needed to map the way forward if justice is to be done and be seen to be done. Although the decision is made in group context, the ultimate responsibility rests with the prosecutor designated by the Investigating Director⁸ to lead the investigation. This consultation should be seen as one of the crucial steps towards realising a joint intervention strategy.⁹ The Commission is of the opinion that it would be counter-productive to require a multi-disciplinary consultation for each reported sexual offence matter. **The Commission endorses the gist of the NDPP Policy Directives relating to a multi-disciplinary approach and further recommends that specific reference be made in the Directives to the convening of a multi-disciplinary consultation. For purposes of accountability it is recommended that a prosecutor should note his or her decision with regard to the need for such a consultation. Where a consultation is held, the outcome of the meeting must also be noted. These procedures should be contained in the appropriate sexual offence management protocol.**

15.3 The way forward following a decision not to prosecute or to suspend prosecution

15.3.1 The conventional criminal justice system is widely regarded as having severe limitations in dealing with sexual offenders. Some of the major limitations, a number of which were described in the Issue Paper, are:

- It is difficult to prosecute offences successfully because of the complexities involved when children give evidence.
- The criminal justice process is not victim-friendly and does not encourage the reporting or prosecution of sexual abuse cases.
- Imprisonment and other conventional forms of punishment are ineffective as means of rehabilitating offenders.
- The impact of the trial and punishment of an offender may irreparably damage a family that may otherwise be rehabilitated.
- The prospect of a harsh sentence for the offender makes families reluctant to report intra-familial sexual abuse, and offenders reluctant to plead guilty.

⁸ See paragraph 4.6.1 above regarding the establishment of a National Investigating Directorate.

⁹ See Chapter 4 above.

15.3.2 The extent of concern about the shortcomings of the conventional system has led to the development of new approaches, particularly in the United States of America.¹⁰ Essentially, they comprise of programmes which offer psychiatric or counseling “treatment”¹¹ to eligible offenders within the criminal justice framework, that is, by court order. The treatment programs differ in the type of offender they accept, the form of treatment they offer, in the stage in the criminal justice system at which they operate, and the formal consequences they impose on the offender. Some programs also assist offenders outside the criminal justice system, that is, without a charge being laid and prosecuted, on a voluntary basis.

15.3.3 The forms of treatment of offenders vary, and can be described as of three main types - behavioural (re-training deviant sexual arousal), psychotherapeutic and family therapy (aiming to change behaviour of different family members, not only the offender). There is a considerable body of literature on the different forms of treatment and their outcomes, the detail of which is not directly pertinent here.¹² Of greater significance is the question at what stage in the criminal process diversion programmes should, if at all, be available to the sexual offender.

15.3.4 A key variation between programmes is the stage at which offenders can participate in them. There are three major approaches: after a charge has been laid but before the trial (pre-trial); after the trial has begun but before judgment (delayed prosecution); after the trial and a verdict of guilty (sentencing). For the purposes of this chapter we will concentrate on the pre-trial diversionary approach which necessitates the holding of a meeting between the prosecution and defence. For present purposes the Project Committee chooses to refer to this meeting as a case management consultation.

15.3.5 Case management consultation

¹⁰ See J Bulkley (ed) **Innovations in the prosecution of child sexual abuse cases (A report of the American Bar Association National Legal Resource Centre for Child Advocacy and Protection)** (third edition) 1983. See also Gelsthorpe, Nellis, Bruins and Van Vliet “Diversion in English and Dutch Juvenile Justice” in Fennel, Harding, Jorg, and Swart (eds) **Criminal Justice in Europe: A comparative study** 199.

¹¹ The South Australian Child Sexual Abuse Task Force regarded the term “treatment” as inappropriate, as it suggests that sexual abuse is an illness that can be cured.

¹² See, for example, Law Reform Commission of Victoria **Report No. 18: Sexual Offences against Children** 114.

15.3.5.1 A pre-trial process which seems to be gaining momentum internationally is the concept of case management consultation, also known as a family group conference. It is usually discussed in relation to and applies to a wide range of family and community based problems such as juvenile delinquency and crime. A case management consultation involves a meeting as soon as possible after disclosure of the commission of an offence. Sequentially a meeting of this nature would occur after a multi-disciplinary consultation has taken place or once the prosecutor has informed him or herself as to the intricacies of the case at hand. The panel is multi-disciplinary, involves the prosecutor (who convenes the consultation), complainant and or the complainants family, the offender and or his or her legal representative and a social worker, and or therapist of the complainant. The aim of the consultation is for the offender to accept responsibility for his or her actions by admitting to the offence, for all parties to agree that there should be consequences and what those consequences should be and how the process is to be monitored.

15.3.5.2 In terms of this approach, a person charged with an offence who meets specified criteria¹³ is offered a programme of treatment, counseling and mediation before the trial is held. To be accepted, accused persons have to formally admit that they have committed the offence. A contract is then concluded between the defence and prosecution. This contract stipulates the conditions which the offender has to comply with and includes an acknowledgment of responsibility by the offender.¹⁴ The conditions may involve therapy, restitution, paying for the victim's therapy or community service. If the offender completes the programme, the charge is withdrawn.¹⁵ However, failure by the offender to adhere to the diversion contract results in the re-institution of charges.

15.3.5.3 The circumstances which would occasion a prosecutor to convene such a consultation are, for example -

- where a child victim refuses to testify;

¹³ Among the criteria which would generally render offenders ineligible for a programme are that they have used violence, have previously been convicted of a sexual offence, or have previously been accepted into a programme and been discharged from it.

¹⁴ The out-of-court settlement does not require an admission of guilt. For further detail see the discussion of this topic below.

¹⁵ New South Wales has implemented a pre-trial diversion programme. See the Pre-trial Diversion of Offenders Act, 1985.

- young age of the victim;
- intra-familial abuse;
- particular vulnerability of the victim;
- particular vulnerability of the offender;
- where either the victim or the offender have special needs, for example, a mental disability which precludes him or her from giving evidence in court.

15.3.5.4 The advantages of a pre-trial diversion programme flowing out of such a consultation are said to be the following -¹⁶

- It encourages increased reporting of offences because it does not carry the stigma associated with criminal prosecution.
- By being offered the possibility of complete avoidance of prosecution, offenders have a strong incentive to accept treatment.
- Victims do not have to appear in court - even if the offender does not complete the treatment programme and is prosecuted, the admission of the offence can obviate the requirement for the victim to give evidence.
- Because it is a criterion for admission to the programme that the offender acknowledges his or her guilt, the credibility of the victim, especially the child victim, is validated.

15.3.5.5 The disadvantages of pre-trial diversion are said to be the following -¹⁷

- It may coerce admissions of guilt from innocent accused persons.
- Offenders may enter the programme to avoid trial and imprisonment rather than because they are committed to being treated, making it difficult to assess whether treatment has been effective.
- It denies the needs of victims - and perhaps those of offenders, as well - to feel that adequate punishment has occurred.

15.3.5.6 The Issue Paper on Sexual Offences by and against children posed questions

¹⁶ Law Reform Commission of Victoria **Discussion Paper No. 12: Sexual Offences against Children** 68.

¹⁷ Law Reform Commission of Victoria **Discussion Paper No. 12: Sexual Offences against Children** 68.

relating to whether a family group conference (for purposes of this paper to be read case management consultation) or a child protection conference should be made mandatory before a matter proceeds to trial. Questions were also posed in relation to the structure, outcome and nature of such a consultation.

15.3.5.7 **The Association for Persons with Physical Disabilities, Northern Cape and Ms W L Clark, a senior public prosecutor from Verulam**, clearly state that they are opposed to the concept of convening a family group conference. **Ms Clark** explains that child abuse is a highly emotional matter and parents, especially if they are upset or indignant, have unrealistic expectations. As lay persons they cannot begin to appreciate the complexities of the law, the requirements of procedure or the rules of evidence, or even what may be in the child's best interests. In her opinion to hold such a conference may result in parents insisting that the matter should proceed when the prosecutor realises the chances of a conviction are slim. Further that -

It is a misconception to believe that prosecutors who handle these cases are callous, bloodthirsty individuals out to nail the accused at any cost and with no regard whatsoever for the child victim's welfare. Any prosecutor who has proper training in these cases is taught to treat them with sensitivity, and in cases where the chances of a conviction are slim or the child is obviously not going to cope with being a witness the matter will be withdrawn rather than putting the child through the trauma of a trial. The prosecutor has the expertise to decide on such matters; the parents should not be allowed to dictate on these issues. The welfare of the child is one of the factors a properly trained prosecutor should and does consider.

In the same vein **Mr P Nel**, a **senior public prosecutor in Port Elizabeth**, opines that children are very susceptible to manipulation or coercion by adults and families with their own agendas. **Prof CR Snyman** of the **Department of Criminal and Procedural Law, UNISA**, agrees and points out that obliging a child to attend a conference could lead to secondary victimisation.

15.3.5.8 **Adv d'Oliviera SC, Office of the Attorney General, Transvaal**, also expresses his reservations in this regard. In his view a mandatory family group conference is not called for.¹⁸ He explains that a probation officer's report is usually contained within the docket, so too are all relevant views. In many instances, representations are made by the victim's family

¹⁸ This sentiment is shared by **Ms Blumrick, Office of the Attorney General, Pietermaritzburg and Ms Thuli Madonsela, Department of Justice**.

regarding the non-desirability of the institution of criminal proceedings. All of these views are taken into consideration, often after consultation. A mandatory family group conference might not always be called for and will prolong the process. Since the decision to prosecute is taken through a process of balancing the various relevant interests, by taking into account the best interests of the child as well as those of children in general, this decision is not always the popular one. The decision to prosecute is taken in the interests of the community which includes children. He strongly recommends that, rather than interfering with the prosecutorial discretion, means be sought to alleviate the stress placed on the child.

15.3.5.9 However, **Dr JM Loffell**, a **Social Work Consultant** for the **Johannesburg Child Welfare Society**, notes that this process would be useful in that the child's and family's current status could be assessed, and decisions made jointly by key role-players, before a trial commences. In her opinion such conferences might substantially affect the ongoing management and outcome of cases. A problem she identifies is the lack of personnel who are equipped for this type of highly skilled work; the necessary training would, however, have to be put in place. She suggests that the management of conferences should be built into the intervention protocols which need to be developed for child abuse management all over the country. Approaches might vary from area to area depending on local conditions and resources. She concedes though that the decision to prosecute must be taken by the authorities involved; there should also be regulations in terms of which prosecution is automatic in some categories of offences, and proceeds whether or not the complainant withdraws charges. The present practice of some CPU officers of refusing to take a statement from a child and/or to press charges without the permission of a parent (e.g. the mother in an incest case) is unacceptable; this should be corrected *inter alia* via intervention protocols.

15.3.5.10 A few respondents endorse the concept unreservedly.¹⁹ Despite some reservations, a number of respondents agree that the outcome of the conference must be binding and that the offender must acknowledge guilt.²⁰ Some opinions vary with regards to

¹⁹ **Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government; Sr Potter, Agape C.P. School and Karin Vervaart, Wes Kaap Forum vir Straatkinders.**

²⁰ **Snr Supt JW Booyesen, Serious Violent Crime: Kwazulu Natal; Annamarie Bezuidenhout, Social Work Services, SAPS; Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government; Sr Potter, Agape C.P. School and**

who should and should not be present. The following suggestions are made:

- where a child victim is involved, that a parent or social worker should also be present as well as the presiding officer, a social worker, a significant member of the family, and the investigating officer;²¹
- that a family member of the victim, a social worker, a teacher, a priest, two lay members from the CPF and two police officials - one each from the CPF and the CPU - as well as two people from the Justice Department should be included;²²
- all role-players, including the children's court, welfare worker, investigation officer and any other professional person who might be able to assist, must form a team to decide the matter, but that the members should differ according to the needs of the case;²³
- the accused and the victim should not be present at the same time;²⁴
- the conference should involve the prosecutor, social worker/therapist for the child and offender and the family itself as well as the investigating officer.²⁵

15.3.5.11 The Issue Paper posed a few questions relating to diversion. The questions and the responses to them will be dealt with seriatim. The questions were whether legislation should establish a diversion programme and, if so, at what stage of the criminal process? How should such a programme be structured?

15.3.5.12 A few respondents categorically oppose diversion as an option.²⁶ **Ms Clark** shares this sentiment and explains that diversion programmes are presently used to keep youthful offenders out of the criminal justice process in cases of a fairly trivial nature. In her opinion most, if not all, cases involving sexual abuse of children can hardly be described as trivial, therefore she cannot see any advantage in or reason to establish a diversion

Ms Thuli Madonsela, Department of Justice.

²¹ **Ms Thuli Madonsela, Department of Justice.**

²² **Department of Local Government, Housing and Land Administration, Mpumalanga Provincial Government.**

²³ **Ms S Snyman, Commissioner of Child Welfare, Pretoria Magistrates Office.**

²⁴ **Annamarie Bezuidenhout, Social Work Services, SAPS.**

²⁵ **Snr Supt JW Booyen, Serious Violent Crime: Kwazulu-Natal.**

²⁶ **Association for Persons with Physical Disabilities Northern Cape; South African National Council for Child and Family Welfare.**

programme. **The Office of the Attorney-General of Transvaal** states that diversion programmes should only be considered as an alternative to imprisonment if proven to be effective and that, in the case of an adult offender, diversion will rarely be considered. **Karin Vervaart, WesKaap Forum vir Straatkinders**, sees the role of a diversionary programme only in relation to less serious offences, such as flashing.

15.3.5.13 However, **Professor Davel of the University of Pretoria** and **Ms Madonsela from the Department of Justice** embrace the use of this option. **Professor Davel** opines that diversion programmes should be expanded and that specially trained officials backed by a multi-disciplinary team should undertake referral of cases for diversion. **Ms Madonsela** says that traditional communities on their own divert matters into ADR processes even when adults are involved. The choice by the law is to either ignore these processes or to embrace and develop them to ensure the best interests of the child. She notes that New Zealand has since opted for diversion of adults as well where special circumstances exist and where processes will not be at the expense of the child.

15.3.5.14 The overall sentiment seems to be in favour of conditional support for diversion. **Senior Superintendent J W Booysen, Serious Violent Crime: KwaZulu Natal** states :

Diversion can only be considered if there is an effective system available to control the programme. That includes enough funds available, tracing units that can trace the offender if he or she does not attend the programme, an effective diversion programme with enough manpower available to ensure the diversion programme can be made available to all offenders.

15.3.5.15 **Dr JM Loffell, Social Work Consultant, Johannesburg Child Welfare Society** endorses this option by stating that there should be possibilities for the suspension of prosecution, depending on the type of offence concerned and subject to compliance with clearly defined conditions, within the parameters of a formal diversion programme. In her opinion such an option could be suitable for a significant percentage of incest offenders and juveniles, where the person concerned acknowledges responsibility for the crime. Further that diversion should be possible at an early stage of the proceedings to allow for speedy entry into an appropriate management programme linked to the protection and treatment of the victim and the latter's family. Again, thorough assessment would be a key ingredient of such an approach.

15.3.6 Out of court settlements

15.3.6.1 The South African Law Commission Project Committee on the Simplification of Criminal Procedure has addressed case management consultations in their latest Discussion Paper. The Commission succinctly states the goal of Discussion Paper 100, Simplification of Criminal Procedure (Out-of-court Settlements in Criminal Cases), as being to determine whether there is a need in South Africa to develop procedures that provide for the settling of criminal cases without having to go to court, and if so, the best way in which this can be achieved within the South African context.

15.3.6.2 Reference is made in the discussion paper to the international trend to have some criminal cases dealt with out of court. This trend is based mainly on two considerations, namely to increase the cost-efficiency of the criminal justice process through simplified and streamlined procedures, and to deal with mass petty crime outside of the traditional criminal process. This would present courts with more time to deal adequately with increasingly complex cases.

15.3.6.3 The discussion paper defines an out-of-court settlement as an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing prosecution. The out-of-court settlement is further distinguished from other pre-trial procedures and agreements as follows:²⁷

“It is distinct from sentence and plea agreements in that these follow upon decision by the prosecutor to institute a prosecution. The agreement may affect the offences which the accused is finally charged, but it invariably results in the conviction and sentence of the offender. An out-of-court settlement does not involve the entire criminal process, does not lead to a conviction and does not result in a criminal record.”

15.3.6.4 The discussion paper identifies a number of procedures of a diversionary nature which currently exist in South African Legislation. They are section 57 of the **Criminal Procedure Act** which provides for the payment of admission of guilt and payment of a fine without appearing in court in relation to trivial charges; section 341 which deals with municipal offences and certain motor vehicle offences; section 57A which provides for the admission of guilt and payment of a fine after appearing in court in relation to trivial charges; section 254 which deals with the stopping of a trial in the case of an offender under the age of 18 years if

²⁷ Paragraph 2.4 of the South African Law Commission Discussion Paper 100, Simplification of Criminal Procedure (Out-of-Court Settlements in Criminal Cases).

he or she is a child in need of care, and bringing the child before a children's court;²⁸ and section 255(1) which provides that a court may order an enquiry under the **Prevention and Treatment of Drug Dependency Act**, 1992, which may not be used if the punishment of imprisonment would be compulsory if the accused were convicted at such trial.²⁹

15.3.6.5 The Discussion Paper refers to the international move towards introducing the principle of "discretionary power".³⁰ However, it is clear that this "power" is only exercised in relation to minor and mass minor offences. Particular mention is made of the Council of Europe's Recommendation No R(87)18. The main consideration underlying this recommendation is to accelerate and simplify the working of the criminal justice system, while taking due consideration of articles 5 and 6 (the right to a speedy trial) of the European Convention on Human Rights, as well as the increase in the number of criminal cases and the fact that delays in dealing with crimes bring criminal law into disrepute and affect the proper administration of justice.³¹

15.3.6.6 On the basis of extensive research on current developments regarding out-of-court settlements in Europe in which the positions of Germany, Denmark, England and Wales, France, Belgium, Italy, The Netherlands, Portugal, Spain, Austria, Switzerland, Poland, Australia and the United States are explored, it is clear that a variety of out-of-court settlements are provided for in those countries, for crimes of widely different severity, with a wide range of conditions. However, the general position, perhaps stated very simplistically, is that a prosecutor³² may only exercise his or her discretion in this regard if only a fine is prescribed as punishment (in relation to a petty offence) or the accused is a juvenile and confesses to the crime.³³

15.3.6.7 In considering factors pertinent to devising a formal system of out-of-court settlements, the Commission lists and discusses the merits of the following factors, namely,

²⁸ In terms of section 14(4) of the Child Care Act 74 of 1983.

²⁹ Section 255(1)(b).

³⁰ Ibid at pp 16.

³¹ Ibid.

³² Italian criminal procedure does not allow the prosecutor any discretionary dismissal of criminal cases. In Spain no out-of-court settlement is provided for.

³³ For a detailed exposition see Discussion Paper 100.

time and cost saving; the integrity of the criminal justice system; proof of the offence; equal protection; limits to the offences; consent; suitability of the accused person; settlement; the role of victims; the role of legal representatives; the role of the judicial officer; consultation with other interested parties; conditions; procedure; the possibility of appeal or review and mass offences. Of particular relevance are the following findings:

- The new system should not further the public perception that serious crime goes unpunished as this may encourage self-help and may support the idea that the system exists mainly for the benefit of criminals.³⁴
- Since the conditions of an out-of-court settlement will not include the option of imprisonment, it could be determined that an out-of-court settlement should only be permitted if the court would probably not impose imprisonment as its primary sentence, or would probably not impose a term of more than one year's imprisonment (as an indication that the crime is not too serious for an out-of-court settlement).³⁵
- Offences that should qualify the accused person for an out-of-court settlement would generally be restricted to offences at the lower end of the scale of severity. The Commission is of the view that the limiting factor should be the probable sentence should the case go to court.³⁶
- In line with the requirements of due process and the chief characteristic of a true diversionary system, namely that the process does not end in a criminal record, international jurisdictions do not require the accused person to admit to the offence but merely to consent to the settlement.³⁷
- Not every offender is a suitable candidate for an out-of-court settlement. Deferred prosecution can be appropriate if it appears, to the prosecutor, that the accused is not a significant threat to the community and is likely to benefit from an out-of-court settlement. In order for the prosecutor to exercise his or her discretion properly a

³⁴ Ibid at page 30.

³⁵ Ibid at page 31.

³⁶ Ibid at page 32.

³⁷ Ibid at page 33.

database of accused persons who have entered into out-of-court settlements would need to be established. This will enable the prosecutor to determine whether the accused is subject to a current out-of-court settlement, has successfully completed a previous settlement, or has failed to comply with the conditions of such a settlement.

- The settlement should be in writing, and be binding from date of signature.
- Although the victim should be able to make representations to the prosecutor, he or she should not be in a position to veto the decision to enter an out-of-court settlement. The victim should be precluded from instituting a private prosecution against a person who has entered into an out-of-court settlement with the prosecutor.
- As the settlement should not amount to a previous conviction, the accused should only consent to the settlement. The judicial officer therefore has no role to play.
- Although not mandatory, it would be useful to precede the settlement with a consultation between other parties, such as a probation officer or the investigating officer.
- Out-of-court settlements have to be subject to certain conditions. Rather than creating a completely new set of conditions for out-of-court settlements, the Commission recommends that the conditions that are available in the case of the suspension of sentence in terms of section 297 of the **Criminal Procedure Act** should be used as a point of departure.³⁸
- It should be possible to stop the criminal proceedings at any time after a charge sheet has been served upon the accused. The cut-off point for stopping proceedings should be any time before any evidence has been presented in court, even after plea.

15.3.6.8 The discussion paper on out-of-court settlements is accompanied by a proposal that the **Criminal Procedure Act** be amended to provide for out-of-court settlements. The amendments read as follows:

(1) The amendment of section 6 of the principal Act, by the substitution for

³⁸ Ibid at page 36.

paragraph (c) of the following paragraph:

6 Power to withdraw charge, [or] stop or conditionally discontinue prosecution

“(c) if it is determined that the withdrawal or stopping of prosecution, as provided for in subsection (a) or (b) would be inappropriate, nevertheless conditionally discontinue prosecution of the accused, by entering into an out-of-court settlement, as provided for in section 104A of the Act.”

(2) **The substitution for section 57 of the following section:**

57 Payment of amount of money without appearance in court

(1) Where –

(a) a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may **[admit his guilt in respect of the offence in question and that he may]** pay **[a fine]** an amount stipulated on the summons in respect of such offence without appearing in court; or

(b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer,

the accused may, without appearing in court, **[admit his guilt in respect of the offence in question by paying the fine]** pay the amount stipulated **[(in this section referred to as the admission of guilt fine)]** either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the **[fine]** amount may be paid at a specified local authority, at such local authority.

•• (a) The summons or the written notice may stipulate that the **[admission of guilt fine]** amount shall be paid before a date specified in the summons or written notice, as the case may be.

(ii) **[An admission of guilt fine]** Payment of the amount stipulated may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the

date on which the accused should have appeared in court has expired.

3. (a) (i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an **[admission of guilt fine amount]** in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment **[of the fine]**.
 - (ii) If the summons or written notice, as the case may be, is lost or is not available and the copy thereof known as the control document –
 - (aa) is not available at the place of payment referred to in subsection (1), the accused shall surrender a copy of the summons or written notice, as the case may be, at the time of the payment **[of the fine]**; or
 - (bb) is available at the place of payment referred to in subsection (1), the **[admission of guilt fine amount]** may be accepted without the surrender of a copy of the summons or written notice, as the case may be.
 - (iii) If an accused in respect of whom a warrant has been endorsed in terms of section 55(2A) intends to pay the relevant **[admission of guilt fine amount]**, the clerk of the court may, after he or she has satisfied himself or herself that the warrant is so endorsed, accept the **[admission of guilt fine amount]** without the surrender of the summons, written notice or copy thereof, as the case may be.
- (b) A copy referred to in paragraph (a)(ii) may be obtained by the accused at the magistrate's court, police station or local authority where the copy of the summons or written notice in question known as the control document is filed.
3. Notwithstanding the provisions of subsection (1), an accused referred to in paragraph (a)(iii) may pay the **[admission of guilt fine amount]** in question to the clerk of the court where he appears in consequence of such warrant, and if the said clerk of the court is not the clerk of the magistrate's court referred to in subsection (1), he shall transfer such **[admission of guilt fine amount]** to the latter clerk of the magistrate's court.
 4. No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing **[an admission of guilt fine the stipulated amount]** on good cause shown.
 5. (a) **[An admission of guilt fine]** The amount stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence

or, if the magistrate has not made such a determination, in accordance with an amount determined in respect of any particular summons or any particular written notice by either a public prosecutor attached to the court of such magistrate or a police official of or above the rank of non-commissioned officer attached to a police station within the magisterial district or area in question or, in the absence of such a police official at any such police station, by the senior police official then in charge at such police station.

2. **[An admission of guilt fine]** The amount determined under paragraph (a) shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the *Gazette*, whichever is the lesser.
- (vi) **[An admission of guilt fine]** The amount paid at a police station or a local authority in terms of subsection (1) and the summons or, as the case may be, the written notice surrendered under subsection (3), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such summons or, as the case may be, such written notice and of any summons or written notice surrendered to the clerk of the court under subsection (3), in the **[criminal record book for admissions of guilt]** relevant register, whereupon the **[accused concerned]** the matter shall, subject to the provisions of subsection (7), be **[deemed to have been convicted and sentenced by the court in respect of the offence in question]** considered as finalised and the amount so paid shall be dealt with as if it were a fine.
- (g) **[The judicial officer presiding at]** An officer appointed or designated by the magistrate of the court in question shall examine the documents and if it appears [to him that a conviction or sentence under subsection (6) is not in accordance with justice or] that any such **[sentence]** amount, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the **[sentence]** amount is not adequate, such **[judicial]** officer may **[set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course]** return the amount paid, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the **[admission of guilt fine]** amount which has been paid exceeds the amount determined by the magistrate under subsection (5), the said **[judicial]** officer may, in lieu of **[setting aside the conviction and sentence]** returning the amount in question, direct that the amount by which the said **[admission of guilt fine]** amount exceeds the said determination be refunded to the accused concerned."

(3) The deletion of section 57A of the principal Act.

(4) The insertion of the following section in the principal Act:

“104A Out-of-court settlements

- (1) If the prosecutor is satisfied, at any time before any substantial evidence has been adduced against the accused and considering all the facts at his or her disposal that -
- (a) it is in the public interest to do so; and
 - (b) a court would, in the case of a conviction, impose a sentence other than imprisonment, or imprisonment for a period not exceeding one year,
- he or she may enter into an out-of-court settlement with the accused, in terms of which the prosecution undertakes to discontinue prosecution on condition that the accused complies with the conditions as agreed upon in the settlement.
- (2) In considering whether it will be in the public interest to enter into an out-of-court settlement, the prosecution shall have regard to –
- (a) whether the accused poses a significant threat to the community and is likely to benefit from the settlement;
 - (b) the effect of a conviction on the accused;
 - (c) whether, in the case of an accused with two or more previous convictions for the same or similar offences or an accused who have entered into a settlement as provided for in this section on two or more occasions for the same or similar offences, there are substantial and compelling circumstances meriting the settlement; and
 - (d) the interests of the victim of the crime.
- (c) A settlement contemplated in subsection (1) can only be entered into –
- (a) once a charge sheet, setting out the offence or offences for which the accused is being charged, has been served on the accused;
 - (b) if the prosecution is satisfied that there is sufficient evidence to warrant the prosecution of the accused; and
 - (c) through the accused's legal representative, if the accused is legally represented.
- (4) (a) The prosecution must, in exercising its discretion in terms of this provision, if circumstances permit, obtain the views of the investigating officer and the victim of the offence, and must consider such views, before entering into a settlement with the accused.

- (b) If the victim is not available to make representations, the prosecution must notify him or her of the intention to enter into an out-of-court settlement and such notification must give the victim a reasonable time to respond with representations, whether orally or in writing, whether in person or otherwise.
 - (c) For the purposes of this subsection, a "victim" is any person who, as a result of the accused's offence, suffered damage to or loss of property, or injury, whether physical, psychological or otherwise, or loss of income or support.
- (5) An out-of-court settlement is, for a period as agreed upon between the parties, but not more than two years, subject to one or more of the following conditions, as expressly stipulated in the settlement:
- (a) Compensation;
 - (b) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
 - (c) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);
 - (d) payment of an amount of money of not more than the amount prescribed from time to time by the Minister in the *Gazette*, to the State or a state agency as directed by the prosecution;
 - (e) submission to instruction or treatment;
 - (f) submission to supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act No 116 of 1991);
 - (g) the compulsory attendance or residence at some specified centre for a specified purpose;
 - (h) referral to community dispute resolution structures that have been put into place in terms of an Act of Parliament.

Notwithstanding the above, a condition in terms of paragraph (c) shall be limited to a maximum period of one year.

- (6) (a) If the conditions to a settlement under this section requires the accused to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, the prosecutor shall cause a notice to be served on the accused, directing him or her to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or reside thereat, as the case may be.
- (b) A copy of the said notice shall serve as authority to the person mentioned therein to have that community service performed by the person concerned or to provide that instruction or treatment

to the person concerned or to allow the person concerned to attend that centre or to reside thereat.

- (c) Any person who, when he or she reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding three months.

- (7) The terms of the out-of-court settlement –

- (a) must be in writing, and must be signed by the prosecutor and the accused;
 (b) has to be approved by the Director of Public Prosecutions having jurisdiction or an official authorised thereto by him or her;
 (c) may be amended on good cause shown, with consent from both parties: Provided that any amendment must also comply with paragraph (b).

- (8) If the accused fails to comply with any of the conditions of the out-of-court settlement and the prosecutor is satisfied that such failure was beyond the accused's control, or for any other good and sufficient reason, the prosecutor may, having due regard to the extent to which the conditions of the prior settlement has been complied with, enter into a further out-of-court settlement.

- (9) If the accused fails to comply with any of the conditions of the out-of-court settlement under circumstances other than those referred to in subsection (8), the criminal proceedings against the accused on that charge can be resumed from where they were when the out-of-court settlement was entered into: Provided that sections 118 and 275 of the Act applies with the necessary changes: Provided further that, should the accused be convicted, the court imposing sentence shall take into consideration the extent to which the conditions of the out-of-court settlement have been complied with.

- (10) Once the accused has complied with the conditions of the out-of-court settlement, the charge is considered finalised and no prosecution resulting from the same offence may be instituted.

- (11) (a) The provisions of section 106(4) shall not apply where the accused has already pleaded to a charge, except if the trial is resumed as provided for in subsection (9).

- (b) A private prosecution as provided for in section 7 of the Act shall not be allowed during the course of an out-of-court settlement, or after its successful implementation.”

- (4) **The amendment of section 297A of the principal Act by the substitution for subsections (1) and (5) of the following subsections:**

“297A Liability for patrimonial loss arising from performance of community service

- (a) If patrimonial loss may be recovered from an accused on the ground of a delict committed by him or her in the performance of community service in terms of sections 104A or 297, that loss may, subject to subsection (3), be recovered from the State.
- (5) If any person as a result of the performance of community service in terms of sections 104A or 297 has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the **[Director-General: Justice] Minister** may, with the concurrence of the Treasury, as an act of grace pay such amount as he or she may deem reasonable to that person.”

(5) The amendment of section 341 of the principal Act by:

- (i) the substitution for paragraph (b) of subsection (2) of the following paragraph:**

“(b) Any sum of money paid to a local authority as provided in paragraph (a) shall, for administrative purposes only, be deemed to be a fine imposed in respect of the offence in question.”

- (ii) the substitution for subsection (3) of the following subsection:**

“1.3 Any money paid to a magistrate in terms of subsection (1) shall, for administrative purposes only, be dealt with as if it had been paid as a fine for the offence in question.”

- (iii) the substitution for subsection (5) of the following subsection:**

“The amount to be specified in any notification issued under this section as the amount of the fine which a court would probably impose in respect of any offence, shall be determined from time to time for any particular area by the magistrate of the district or area in which such area is situated, and may differ from the **[admission of guilt fine] amount** determined under section 57(5)(a) for the offence in question.”

15.3.7 Recommendations

15.3.7.1 After lengthy debate the Commission has arrived at the conclusion that in order for the state to provide victim protection in the broadest sense, strive to avoid revictimisation

and to spread the net of protection as wide as possible, the concept of holding a case management consultation linked to a diversion option should be embraced. The Commission wishes to emphasise that it considers all sexual offences and especially those against children to be of a serious nature. However, it sadly has to acknowledge the reality that many cases do not make it to trial for a variety of reasons. Many offenders slip through the net at this stage of the process and inevitably re-offend. **In order to protect as many victims and potential victims as possible, the Commission recommends that a case management consultation linked to diversion be provided for sexual offences by expanding the proposals made by the Project Committee on Simplification of Criminal Procedure in relation to out-of-court settlements. It is recommended that the Project Committee on Simplification of Criminal Procedure should include an out-of-court settlement option for certain sexual offences.**

15.3.7.2 **The Project Committee on Sexual Offences recommends that in order to retain a sense of the severity of sexual offences, it must be a prerequisite to convening a case management consultation that the offender makes an admission of guilt. The Project Committee on Simplification of Criminal Procedure is requested to explore this possibility in relation to sexual offences.** This recommendation differs from the proposed amendments to the Criminal Procedure Act made by the Project Committee on the Simplification of Criminal Procedure in relation to out-of-court settlements. The advantage of such an admission is that if the offender should renege on any condition contained in the diversion agreement, the prosecutor is in a position to re-institute proceedings and the testimony of the victim will not be necessary. In so doing a public perception that a diversion option of this nature is beneficial to the offender alone will not be validated. **The Project Committee sees the option of an out-of-court settlement as only being applicable to offences at the lower end of the scale of severity and to offenders who are suitable candidates for diversion. The Commission does not see a role for diversion where the offence is one of rape or any other sexual offence where violence or force was used. However a difficulty arises in relation to especially intra-familial sexual abuse cases, which due to the nature of these cases are serious. Often these cases are extremely difficult to prosecute, leaving the family with no option of intervention, bar the removal of a child. By enabling a prosecutor to make use of a diversionary mechanism such as an out-of-court settlement the offender may receive rehabilitative treatment, the dysfunctionality of a family may be rectified or ameliorated and the source of income is**

not necessarily cut off. The need for expert assessment and involvement in matters of this nature cannot be over emphasised. It is recommended that the Project Committee on Simplification of Criminal Procedure includes legislative guidance in their proposals as to which sexual offences could be dealt with by way of an out-of-court settlement.

15.3.7.3 The Project Committee on Sexual Offences would in relation to sexual offences prefer to exclude the finding made by the Project Committee on Simplification of Criminal Procedure referred to above³⁹ that an out-of-court settlement would only be permitted if the court would probably not impose imprisonment as its primary sentence, or would probably not impose a term of more than one year's imprisonment. Further, the proposed clause 104A (1)(b) should not apply in sexual offence matters. The Project Committee on Sexual Offences recommends that the proposed clause 104A (5) should be amended so as to change the prescribed two year period to at least three years and that an additional condition be built into clause 104A (5) which provides that in the event of intra-familial abuse, the offender is to reside in alternate accommodation for the duration of the settlement. Certain sexual offences may also warrant a condition that prohibits conduct such as frequenting schools.

15.3.7.4 The Commission recommends that the discretion of whether to embark on this pre-trial process should be shouldered by the responsible prosecutor and he or she should be obliged to note the reasons for exercising this discretion in favour of convening a case management consultation as well as the results of the consultation. The procedure to be followed should be contained in the relevant sexual offence management protocol.

15.3.7.5 The Project Committee on Sexual Offences wishes to draw attention to the fact that numerous recommendations are made in subsequent chapters in this discussion paper which impact directly on the way in which complainants will be assisted to interact with the court and the manner in which the complainant may be dealt with. The aim of all of these recommendations is to alleviate trauma experienced by complainants in the present judicial system. The enactment of these recommendations will go a long way to bolstering the testimony of a complainant who is not so robust. **For this reason the Project Committee**

³⁹ See paragraph 15.3.6.7 above.

recommends that the a case management consultation linked to diversion should be used in exceptional cases only.

15.3.7.6 Although the Project Committee recommends that the consultation should be convened by the prosecutor it wishes to refrain from being prescriptive regarding the constitution of the consultation, bar that trained personnel who have assessed the participants must be involved. An expert assessment of the participants during the consultation and the need for expert guidance of the consultation is imperative to its success.

15.3.7.7 The Project Committee recommends that the prosecutor be tasked to draw up the diversion contract. Guidance for the drafting of such contracts should be contained in the protocols. For example, a contract could contain a provision which separates the offender from a child victim or other prospective victims during the period of diversion. It should be a standard pre-requisite that the offender must be willing to submit him or herself to a sex offence specific rehabilitation programme or treatment.

15.4 The way forward following a decision to prosecute

15.4.1 First appearance in court

15.4.1.1 When a decision is made to prosecute a person in detention, he or she becomes an accused person and the rights contained in section 35(3) of the Constitution become applicable. Section 50 of the **Criminal Procedure Act** determines that such a person should be brought to a court of law within 48 hours. However, section 35(1)(d) of the Constitution provides that not only should a person be brought to court within 48 hours but as soon as possible. The period of 48 hours constitutes a maximum period.⁴⁰ Where an accused has not been granted police bail he or she may apply for bail at the first appearance in court. The prosecutor should notify the complainant that the accused is applying for bail and what the outcome of the application was. At the accused's first appearance, he or she will also be informed of the right to legal representation if he or she is not already represented.⁴¹ At this point a date should be set down for the commencement of the formal trial.

⁴⁰ Nel & Bezuidenhout (eds) **Policing and Human Rights** Juta 1997 at 185.

⁴¹ See chapters 11 and 16 above in for a detailed discussion of bail and legal representation.

15.4.2 Pre-trial notification

15.4.2.1 In terms of a recommendation contained in Chapter 23 below, once a prosecutor has made the decision to prosecute, he or she should notify witnesses of available protective measures in terms of the new Sexual Offence Act. At this point the prosecutor should notify the complainants and any other witnesses of the date of the trial as well as the availability of protective measures. If such measures are required an application on their behalf will be made to the court on the first day of the trial to have them declared vulnerable witnesses. Chapter 22 below discusses the merits of declaring certain witnesses vulnerable. In Chapter 23 below, notification of witnesses of available protective measures is recommended. Although declaration of a person as a vulnerable witness should in the best case scenario occur at the commencement of the trial, the fact that a witness may need to be declared vulnerable during the trial proceedings should not preclude the witness from being so declared.

15.4.2.2 The Commission recommends that in order for the court to make a decision with regard to the vulnerability of a witness the prosecutor should where appropriate lead expert evidence.

15.4.3 Pre-trial conference to isolate issues in dispute

15.4.3.1 In the matter of **S v Dontas and Another**⁴² Judge Swart makes the following statement:

I have, however, referred to the foregoing in some detail because it (and other similar problems) should illustrate to the legislature the crying need for not only a proper pre-trial procedure in criminal matters, but for one in which judicial officers are available to dispose of pre-trial motions and issues including, as in this case, ordinary logistic difficulties regarding an interpreter and the question of discovery before a matter is finally set down for hearing in which a Court, conceivably assessors, witnesses and counsel would be involved.

15.4.3.2 Consequently the Commission would like to emphasise the concept of isolating issues in dispute prior to trial. The intricacies of defence disclosure are dealt with in Chapter 20 below.

⁴² 1995(3) BCLR 292 (T).

15.4.3.3 The Project Committee on the Simplification of Criminal Procedure has recently made recommendations in this regard.⁴³ This Committee notes that, to some degree, section 115 of the **Criminal Procedure Act** is directed towards assisting to isolate the true issues and to enable a trial to be conducted more expeditiously. Section 115 of the Act facilitates defence disclosure if the defence chooses to make such disclosure. The Committee proceeds to state that while there is no realistic mechanism to compel an accused to make disclosures, there is scope for enhancing the judicial officer's powers of questioning in terms of section 115 of the Act.⁴⁴ The Committee notes that there is some merit in providing for a formal structure within which, particularly in more complex cases, proper and serious attempts can be made to isolate issues, and generally regulate the conduct of the case. The Committee then recommends that provision be made in the **Criminal Procedure Act** for an amendment of section 115 of the Act which enhances the powers of judicial officers and creates a procedure for the holding of a conference in appropriate cases before the trial. **The Project Committee on Sexual Offences agrees with this recommendation and deems it necessary to make these provisions applicable to sexual offences.** The proposed recommendations made by the Project Committee on the Simplification of Criminal Procedure are submitted for comment. They read as follows:

(a) **Section 115 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:**

- (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, **[may] shall—**
- (a) inform the accused—
- (i) that he or she has a right to remain silent;
(ii) of the consequences of not remaining silent;
(iii) that he or she is not compelled to make any confession or admission that could be used in evidence against him or her; and
- (b) ask **[him] the accused** whether he or she wishes to make a statement indicating the basis of his or her defence.

⁴³ South African Law Commission Discussion Paper 96 Project 73 Simplification of Criminal Procedure (A more Inquisitorial Approach to Criminal Procedure - police questioning, defence disclosure, the role of judicial officers and judicial management of trials 2001.

⁴⁴ Ibid at page 130.

- (2) (a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he or she denies or admits the issues raised by the plea, the court **[may]** shall question the accused in order to establish which allegations in the charge are in dispute.
- (b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and the court—
- (i) shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty; and
- (ii) may enquire from the accused whether any other allegation,

may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

- (b) **The following Chapter is hereby inserted in the principal Act after section 149:**

CHAPTER 21A

PRE-TRIAL CONFERENCE

Court may direct that pre-trial conference be held

- 149A.** (1) The presiding judge, regional magistrate or magistrate may, on the application of the prosecutor or the accused or at his or her own instance, at any time after the accused has entered a plea of not guilty and before any evidence in respect of any particular charge has been led, direct the prosecutor and the accused and, if the accused is represented, his or her legal adviser, to appear before him or her in chambers to consider—
- (a) the identification of issues not in dispute;
- (b) the possibility of obtaining admissions of fact with a view to avoiding unnecessary proof;
- (c) where the accused indicates his or her intention of raising an alibi defence, the disclosure of sufficient details to enable the prosecution to investigate such alibi defence;
- (d) where the accused indicates his or her intention of raising a defence contemplated in section 151C, the disclosure of such defence;
- (e) the necessity of calling or disposing of expert evidence;

- (f) such other matters as may aid in the disposal of the trial in the most expeditious and cost effective manner.
- (2) The court shall record in open court the agreements entered into and the concessions made.
- (3) The accused shall be required by the court to declare whether he or she confirms such agreement or concession and if he or she so confirms, such agreement or concession shall be binding, unless retracted at the trial to prevent manifest injustice.
- (4) The failure of an accused to disclose sufficient details of an alibi defence to enable the prosecution to investigate the alibi may be a factor taken into account by the trial court in determining the weight of the alibi defence.
- (5) The accused's co-operation at such pre-trial proceedings may be taken into account as a mitigating factor by the trial court for purposes of sentencing.

CHAPTER 16

LEGAL REPRESENTATION

16.1 Introduction

16.1.1 Legal representation plays an important role in enabling persons to enforce their rights, for “rights are useless unless the people who have those rights are aware of them, their significance, and how to use them effectively”.¹ However, the right and capacity to participate in a criminal trial may be undermined by the fact that legal representation is generally too costly for the majority of South Africans . This Chapter discusses legal representation of the accused and the victim in trials involving sexual offences.

16.2 Current provision of legal representation for accused persons.

16.2.1 The principle of legal representation for persons on trial for allegedly committing a sexual offence has come before South African courts on many occasions.² In the 1992,³ in the case of **S v Rudman and Another; S v Mthwana**,⁴ the Appellate division held that although it was ideal that an accused person be afforded legal representation, it could not, at that time, be attained, but that the ideal should not be lost sight of and should guide all concerned with its improvement.

16.2.2 In 1996, the final Constitution was enacted. Section 35(2)(b) of the **Constitution of the Republic of South Africa**⁵ provides that:

Everyone who is detained, including every sentenced prisoner, has the right to choose, and to consult with, a legal practitioner, and to be informed of his right promptly.

1 **Human Rights for South Africans** edited by M Robertson and M Seneque Cape Town: Oxford University Press 1991 at p 75.

2 See further **S v Radebe; S v Mbonani** 1988 (1) SA 19 (T) ; **S v Khanyile and Another** 1988 (3) SA 795 (N); **S v Mthwana** 1989 (4) SA 361 (N); **S v Mathebula** 1990 (1) SACR 20 (N).

3 Prior to the enactment of the **Constitution of the Republic of South Africa** 108 of 1996.

4 1992 (1) SACR 70 (A).

5 Act 108 of 1996.

16.2.3 This is supplemented by section 35(2)(c) of the 1996 Constitution as every detained or sentenced person has the right:

to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

16.2.4 Further section 35(3)(g) of the 1996 Constitution provides that every **accused** person has a right to a fair trial, which includes the right

to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

16.2.5 A number of international legal instruments uphold the right to legal representation and limit the right to state-assisted legal representation to cases where the interests of justice require that an accused person be afforded legal representation at state expense.⁶

16.2.6 The Legal Aid Board was constituted as a body corporate and is responsible for making available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution.⁷ It is not within the scope of this paper to discuss the Legal Aid Board and issues related thereto.⁸ In principle, however, the accused is entitled to legal representation, at State expense, if substantial injustice would otherwise result.

16.2.7 Special mention needs to be made in relation to the juvenile offender and legal representation. Following the ratification of the United Nations Convention on the Rights of the Child in 1995, the South African Law Commission was tasked with an investigation into juvenile

6 Article 6(3)(c) of the **European Convention on Human Rights**; and Article 14(3)(d) of the **International Covenant on Civil and Political Rights**.

7 Sections 2 and 3 of the **Legal Aid Act** 22 of 1969.

8 The Department of Justice and Constitutional Development is addressing difficulties that have arisen into the state funded scheme for the provision of legal services for indigent persons.

justice. Pursuant thereto a Report and Bill has been developed.⁹ Clause 98 in Chapter 10 of the Report on **Juvenile Justice** makes provisions for a child to be provided with legal representation, at State expense, in the following circumstances:

- (a) the child is remanded in detention pending plea and trial in a court;
- (b) the matter is remanded for plea and trial in a court in respect of any offence, and it is likely that a sentence involving a residential requirement may be imposed; or
- (c) the child is at least ten year but not yet 14 years of age and a certificate has been issued in terms of clause 6(3) in respect of such child,

and no representative was appointed by the child, the parent or an appropriate adult in terms of clause 97(2).

16.2.8 In addition sub clause 98 (2) places a duty on the prosecutor to indicate to the court, prior to plea and trial, whether in his or her opinion, the case is one that falls into (b) above, in which case the plea may not be taken until a legal representative has been appointed. The Legal Aid Board may designate an attorney or candidate attorney employed at a Legal Aid Clinic to represent the child so charged.¹⁰

16.3 **Current Position for the provision of legal services for the victims of sexual offences (the sexual offence complainant as ancillary prosecutor)**¹¹

16.3.1 **Current position in South Africa**

16.3.1.1 The South African criminal justice system is ostensibly adversarial in nature. Criminal trials are viewed as two sided battles between the state - represented by the public prosecutor - and the accused, who has a right to legal representation.¹² The judge or magistrate in the criminal trial acts as an impartial 'umpire' who decides the guilt or innocence of the accused once all the evidence has been adduced by both sides.

9 South African Law Commission Report **Juvenile Justice** Project 106 July 2000.

10 Clause 98(3) of the Draft Bill.

11 This section was prepared by Advocate B Pithey, Ms H Combrinck, Ms L Aartz assisted by Ms N Naylor as part of a document commissioned by the then Deputy Minister of Justice Dr Msimang-Tshbalala (now Minister of Health) on the Legal Aspects of Rape.

12 Section 35(3)(g) of the 1996 Constitution.

16.3.1.2 The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented.¹³ The position of the prosecutor differs from that of the defence counsel in the sense that the latter is representing a particular client, whose interests are predominant. There is, for instance, no reciprocal duty on defence counsel to disclose evidence which could potentially be favourable to the prosecution.¹⁴

16.3.1.3 In the South African system, as in any other adversarial system, a sexual offence is also seen as a crime against the state and not against the victim.¹⁵ The effect of this is that the complainant in a sexual offence case is, despite the nature of the crime, no more than a state witness and is not entitled to separate legal representation in the criminal trial. He or she, together with any other witnesses that the prosecution may call to assist the state in proving its case beyond a reasonable doubt, is only part of a chain of evidence.

16.4 **Problem statement**

16.4.1 The problem that victims / complainant faces that they have no separate legal representation. The question is whether he or she should be entitled to such representation.

16.5 **Before the criminal trial**

16.5.1 The period of time from when a sexual offence is reported to the police to when the matter goes to trial is often very long - it may occasionally take a case years to reach trial stage. This length of time may have a negative effect on the quality of the victim's/ complainant's evidence.

16.5.2 At present, the victim / complainant is usually not included in the investigation

13 See the National Prosecution Policy recently tabled in Parliament by the National Director of Public Prosecutions (in terms of sections 21 and 22(2) of the **National Prosecuting Authority Act** 32 of 1998, read with section 179(5) of the 1996 Constitution) at 3.

14 See H Combrinck **Ethics in Prosecution: A South African Perspective** (Unpublished paper presented at Conference on International Perspectives on Crime, Justice and Public Order, Ireland, June 1996).

15 See in this regard L Fryer 'Law versus prejudice: views on rape through the centuries' (1994) 60 **SACJ** at p 77.

of the matter after providing her or his initial statement about the sexual offence. This implies that potentially useful information (for example, communication between the accused and the victim subsequent to the sexual offence)¹⁶ is not brought to the attention of the investigating officer until the trial stage. The victim / complainant is 'on her or his own' in the sense that:

- Little if any information is communicated to her or him as to the progress of the investigation of the case;
- She or he is not given information as to whether the accused has been granted bail;
- She or he is not given information about the conditions attached to a successful bail application on the part of the accused.

16.5.3 In addition, the victim / complainant is not given information about crucial steps in the progress of the case, for example -

- • Her or his recourse if bail conditions are broken by the accused;
- • Any other recourse she or he may have in law to protect herself or himself from the accused if the accused is out on bail, in terms of the **Witness Protection Act 112 of 1998**.
- • The date of court appearances of the accused;
- • Decisions made by the Director of Public Prosecutions or his or delegated authority as to whether they are going to prosecute the matter or not;
- • The date of the trial.

16.5.4 A further significant defect in the system is the fact that victims / complainants are seldom given an opportunity to meet with the prosecutor before trial to discuss any or all

16 For example, where the accused attempts to threaten or bribe the complainant into withdrawing the charges.

of the following:¹⁷

- • The process and procedures of the trial, who the various role players in the court are and what they do;
- • The structure and layout of the court room;
- • Where to go and what to do on arrival at the court on the day of the trial;
- • The evidence the victim / complainant will be expected to give and why (prosecutors often fail to explain to sexual offence victims / complainants why it is necessary, for example, to relate details of whether there was penetration of the vagina by the penis of the accused)¹⁸;
- • Potential differences between the police statement and the evidence that the victim / complainant will give in the courtroom, and what the consequences of such differences are likely to be;
- • The sort of questions to be expected from the defence and what the purpose of cross-examination is;
- • The nature of the other evidence to be presented by the prosecution (for example, medical evidence);
- • The likely time frames of the trial;
- • What the process will be if the accused is convicted; and
- • The victim's / complainant's role in sentencing.

17 B Pithey & A Lillian 'The Victim Rights Movement in South Africa: Shifting From Policy to Practice from a Gender Perspective' (Unpublished paper read at the **World Conference on Modern Criminal Investigation, Organised Crime and Human Rights** South Africa September 1998).

18 The present definition of rape requires penile penetration of the vagina in order to satisfy the element of 'sexual intercourse'.

16.5.5 Legal representation of the victim / complainant at the pre-trial stage would obviously be of assistance as the legal representative would explain the process to the victim, bring pressure on the State and defence to meet the time frames set and generally advise the victim / complainant of remedies he or she may be entitled to should, for example, the accused intimidate him or her.

16.6 **The criminal trial**

16.6.1 Frequently, the true nature of the victim's / complainant's experience and its traumatic effects do not emerge during her or his testimony. This can be ascribed to a number of reasons:

- Where a pre-trial meeting with the prosecutor does take place, due to staff shortages and a high level of staff turnover the prosecutor who appears for the State during the trial may not be the same as the one who did the interview;
- As a result of the lack of understanding and insensitivity to victims / complainants of a sexual offence and the limited space in most courts, many victims / complainants often wait to testify in the corridors of the criminal courts where the accused, together with his or her supporters, also wait - leading to intimidation and a great deal of distress on the part of the victim / complainant;
- The sexual offence complainant is then expected to testify in a court room full of strangers who do very little to allay her or his fears. It is possible that at this stage the only person she may actually recognise is the accused. She or he is required to tell these 'strangers' about the most intimate, traumatic event in her or his life in graphic detail, without any explanation as to why she or he is being asked such questions.
- Testimony is limited to answering questions she or he is asked by the prosecutor or defence, and thus there are often details of the sexual offence that are omitted simply because she or he is not asked about them.
- The victim / complainant may be too ashamed to speak about such intimate matters.

- The victim / complainant may be intimidated by the presence of the accused in the courtroom.
- The questions that the victim / complainant is asked by the accused's legal representative, or by the accused himself, are often intended to -
 - • badger her or him;
 - • shame or humiliate her or him further;
 - • create an impression that she or he is lying; or
 - • imply that she or he is a morally questionable person.
- Due to inexperience and overwhelming case loads, prosecutors are often under prepared for trial and therefore not familiar with the subject matter of the particular case.

16.6.2 In conclusion, the above factors greatly influence and effectively jeopardize the testimony of a complainant. Due to the fact that she or he has been given so little information about the trial and what is expected of her or him, it is of little surprise that the victim's / complainant's testimony is often unclear, contradictory and incomplete.

16.6.3 A legal representative for the victim / complainant would be able to assist the latter by objecting to questions put to the victim / complainant in cross-examination that exceeds the bounds of permissible cross-examination. While the presiding officer may intervene to limit such excessive questioning frequently such questioning is allowed.¹⁹ In fact what a legal representative could do is fill in the practical gaps in the current system that either the court should carry out or the prosecutor, but do not do.

16.7 Comparative analysis

16.7.1 Germany

16.7.1.1 The German criminal law system is inquisitorial in nature, and not adversarial. Pizzi and Perron explain that this implies a system in which:²⁰

[T]he judges have an obligation at trial to examine, evaluate, and weigh all relevant

19 See further Chapter 38 below on the Examination of Witnesses.

20 WT Pizzi and W Perron 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problem's (1996) 37 **Stanford Journal of International Law** at 44.

evidence in order to reach an accurate determination of the issues. Because the judges have an affirmative obligation to inquire into the charges, it is the judges, not the parties, who have the primary responsibility for deciding which witnesses will be heard at trial, and it is the judges, not the parties, who usually conduct the bulk of the examination of those witnesses.

16.7.1.2 Since the judicial function within this system comprises an investigative inquiry aimed at establishing the truth, the state and the accused are not pitted against each other in an adversarial contest to win the case.²¹

16.7.1.3 The German system allows for a complainant who has been injured by an unlawful act to participate as an ancillary accuser (*'Nebenklager'*) in the criminal prosecution of the accused.²² The procedure is limited in that it is available only in crimes that have a very personal impact on the victim, including murder, assault, kidnapping, and rape.²³ The purpose of the *Nebenklager* procedure is to strengthen the rights of the victim / complainant and in no way replaces or interferes with role the prosecutor.

16.7.1.4 The *Nebenklager* procedure allows the complainant to apply to the court by way of affidavit to participate as an ancillary prosecutor once the state has instituted proceedings against the accused.²⁴ Once permission is granted by the court, the victim becomes a party to the criminal trial and receives treatment equal to that of the accused in that he or she has the right to be present throughout the proceedings and can participate through her legal representative like the accused.²⁵ He or she may also under certain circumstances apply to receive state-funded legal representation if she is indigent.²⁶

16.7.1.5 Where a legal representative is appointed, he or she represents the interests of the victim / complainant at trial. A legal representative for the victim / complainant thus functions much like the legal representative for the accused, and will have the right to question

21 Damaska **Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study** (1973) Univ Pa at 580-582.

22 Section 395(1) of the German **Strafprozessordnung** [StPO].

23 Ibid

24 Section 396(1) of the StPO.

25 Section 397(1) of the StPO.

26 Section 397a of the StPO.

witnesses, inspect records, request the recusal of a judge, bring appropriate motions, apply to have evidence adduced and present a closing argument at the end of the trial.²⁷

16.7.1.6 The *Nebenklager* procedure allows for the witness to explain fully all he or she knows about the crime and its surrounding circumstances. Instead of answering questions, he or she gets the opportunity to tell his or her own story, in his or her own words, through his or her own legal representative. This process ensures that the evidence is presented to the court in a manner that is nearest to its original form as possible – untainted by police, defence and prosecutorial interpretation of the events.

16.7.1.7 The rationale for allowing the victim / complainant to join as an ancillary prosecutor is not the public interest of the prosecution of crimes, but his or her personal interest in obtaining satisfaction for the suffering that is the consequence of the crime.²⁸ In addition to this, a type of protection of his or her interests is essential because of the nature of a sexual offence trial. A complainant in a sexual offence trial is often subjected to harsh cross examination by the defence counsel about previous sexual history, late reporting of the sexual assault and alleged spurious accusations of sexual assault.

16.8 United States of America: Ohio

16.8.1 Section 2907.02(f) of the **Ohio Criminal Code** states that:

Upon approval of the court, the victim may be represented by counsel in any hearing in chambers or other proceedings to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

16.8.2 This section was introduced primarily to protect the victim in relation to evidence about his or her previous sexual history and is based on the rationale that it is the adducing of this type of evidence which is so traumatic and damaging to the complainant.²⁹

27 Sections 240(2) and 244(3) -244(6) of the StPO.

28 Pfeiffer **Karlsruher Kommentar zur Strafprozeßordnung und zum Gerichtsverfaßungsgesetz mit Einfuhrungsgesetz** (1993) at 1603.

29 **Ohio Revised Code** Annotated Title XXIX Commentary on Section 2907.02(f).

16.9 Evaluation

16.9.1 It should be recognised that with regard to the investigation and prosecution of sexual offences, the interests of the complainants are different to those of the state. As stated previously, the objective of the prosecution is to prove the guilt of the accused beyond reasonable doubt, while the interests of the complainant are those of obtaining personal satisfaction for the suffering as a consequence of the sexual offence and to be protected from further trauma during the trial process. The interests of these two parties thus do not always coincide and it is therefore necessary to ensure that the complainant's interests are properly protected.

16.9.2 An example of this is the often harsh cross examination of a rape complainant by defence counsel about previous sexual history. The prosecution may believe that a series of negative responses (denying sexual experience) from the complainant may strengthen the State's case, whereas the complainant may not only resent the questioning but may also refuse to answer such questions.³⁰ This may lead the court to draw incorrect conclusions about the complainant's 'lack of co-operation'.

16.9.3 The question is whether allowing the victim to participate in the trial as an ancillary prosecutor is the best manner in which to solve the problems inherent in a sexual offence trial conducted within a largely adversarial system.

16.9.4 We contend that the adoption of the German *Nebenklager* procedure is not the only manner in which to improve the quality of and experience of testimony of sexual offence complainants (and thus ensure a higher conviction rate). The Commission takes the view that it is sounder, in law, to introduce measures aimed directly at the harmful and often unhelpful rules and regulations that are the real obstacles to the protection of a victim's / complainant's interests in a sexual offence trial. The Commission is further of the view that the recommendations contained in this Discussion Paper will greatly assist complainants and advance the protection of their interests in a manner consistent with the constitutional imperatives applying to the State.

30 In addition, prosecutors often believe that the sight of a complainant 'breaking down' in court tends to strengthen the state's case, and therefore do not immediately intervene when the complainant is visibly experiencing distress.

16.10 Although all victims suffer individual trauma, crimes are committed against society at large. It is therefore proper that the State, and not the victim, prosecutes sexual offences.

16.11 **Recommendation**

1. **The Commission does not recommend the introduction of complainants as ancillary prosecutors in sexual offence trials.**

CHAPTER 17**PLEAS AND PLEA BARGAINING****17.1 Introduction****17.1.1 Pleas**

17.1.2 The plea tendered in response to a charge serves an important dual purpose in that it determines, first, the ambit of the dispute between the accused and the prosecution and, secondly, the procedure to be adopted.¹

17.1.3. The accused is to plead to the charge before the trial commences.² Section 109 of the **Criminal Procedure Act** 51 of 1977 provides for the recording of a plea of not guilty where an accused refuses to plead. Section 106 sets out the pleas that an accused may tender. Briefly, an accused may plead:

- (a) that he or she is guilty of the offence charged or of any offence of which he or she may be convicted on the charge; or
- (b) that he or she is not guilty; or
- (c) that he or she has already been convicted of the offence; or
- (d) that he or she has already been acquitted of the offence with which he or she is charged; or
- (e) that he or she has received a free pardon under section 327(6) from the State President for the offence charged; or
- (f) that the court has no jurisdiction to try the offence; or
- (g) that he or she has been discharged under the provisions of section 204 from prosecution for the offence charged; or

1 Du Toit et al **Commentary on the Criminal Procedure Act** Juta Service 26 2001 at 15-1.

2 Section 105 of the **Criminal Procedure Act** 51 of 1977.

- (h) that the prosecutor has no title to prosecute; or
- (i) that the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)(c).

17.1.4. Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.³

17.1.5 Currently, there is not much room for prosecutors to plea bargain on charges such as rape due to the fact that South Africa does not have graded sexual offences. An example of grading of sexual offences is as follows: sexual violation in the first degree and sexual violation in the second degree. What distinguishes these two degrees of severity maybe the difference between penile rape and digital rape with the former carrying a heavier sentence. If sexual offences are graded in this way there is obviously more bargaining space and leverage for prosecutors. For it is one thing to lower a charge of sexual violation in the first degree to accept a plea of guilty on a lower charge of sexual violation in the second degree. It is an entirely different matter to lower a charge from rape to indecent assault.

17.2 Plea bargaining

17.2.1 There are various definitions of plea bargaining. The South African Law Commission Project on the Simplification of Criminal Procedure (Project 73) sets out the following definitions in the **Fourth Interim Report on Sentence Agreements**.⁴

- Albert W Alschuler⁵ defines plea bargaining as follows:

Plea-bargaining consists of the exchange of official concessions for a defendant's act of self conviction. Those concessions may relate to the sentence imposed by the

3 Section 106(2).

4 April 2001. The definitions section set out in this chapter is drawn directly from pages 4 - 5 of the **Fourth Interim Report**.

5 'Plea-Bargaining and its History' **Columbia Law Review** (1979) 1.

court or recommended by the prosecutor, the offence charged, or a variety of other circumstances;

- The Canadian Law Commission⁶ initially defined plea bargaining as follows:

"any agreement by the accused to plead guilty in return for the promise of some benefit".

In a subsequent working paper⁷ that Commission used the more neutral expressions of "plea negotiations" or "plea discussions" since it was considered that the purpose of the process was to reach a satisfactory agreement and not to enable the accused to obtain a "bargain". It therefore substituted the expression "plea agreement" for "plea bargain", and the following definition was then given to the process:⁸

. . . any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.

- N M Isakov and Dirk van Zyl Smit⁹, on the other hand, refer to the process as:

the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence.

This definition is much narrower and equates plea bargaining with sentence bargaining.¹⁰

17.2.2 Plea bargaining is a highly controversial issue as the accused is, as a result of a

6 Law Reform Commission of Canada **Criminal Procedure: Control of the Process** Working Paper 15 (1975) at 45.

7 Law Reform Commission of Canada **Criminal Law: Plea Discussions and Agreements** (1989) Working Paper 60 at p 3.

8 Citing Bekker PM 'Plea Bargaining in the United States and South Africa' (29) 1996 **CILSA** at p 173.

9 Negotiated Justice and the Legal Context (1985) **De Rebus** 173.

10 Bekker (29) 1996 **CILSA** at p 174 - 175.

plea agreement, charged with a lesser offence. It is a situation where both the prosecution and the accused compromise: the prosecution charges the accused with a less serious offence, in return the accused does not put the State to the proof of the offence charged. Although not formally provided for plea bargaining does take place in South Africa. However, the possibilities for plea bargaining in South Africa at present are limited. One possible option arises when an accused is charged with multiple offences where the prosecution could reduce the number of charges to encourage the accused to plead guilty.

17.2.3 The issue of plea bargaining has been the subject of an extensive investigation by the South African Law Commission. In its Fourth Interim Report on Simplification of Criminal Procedure¹¹, the Commission recommends the enactment of legislation to regulate sentence agreements in South Africa and proposes that the prosecutor, subject to the directives issued by the National Director of Public Prosecutions, and an accused, or his or her legal practitioner may before the accused pleads to the charge, enter into an agreement in respect of–

- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
- (ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty.

17.2.4 The Commission recommended further that the prosecutor may only enter into such agreement if it is reasonably feasible, after consultation with the police official charged with the investigation of the case and with due regard to the nature and circumstances relating to the offence, the personal circumstances of the accused and the interests of the community. Further, if circumstances permit after allowing the complainant or his or her representative to make representations on the agreement and the inclusion of a compensation order referred to in section 300 of the **Criminal Procedure Act** 51 of 1977.¹²

17.2.5 The Commission recommended that the presiding officer must consider the

11 Simplification of Criminal Procedure (Project 73) the **Fourth Interim Report on Sentence Agreements** May 2001.

12 South African Law Commission **Fourth Interim Report on Sentence Agreements** p 38.

sentence agreed upon in the agreement and may direct such enquiries regarding facts relevant for this purpose, and if the presiding officer is satisfied that such sentence is appropriate, he or she shall inform the parties that he or she is so satisfied. Whereupon the agreement shall become binding upon the prosecutor and the accused, the accused will be asked to plead to the charge and the presiding officer shall find the accused guilty on the charge agreed to and impose the sentence agreed to.¹³

17.2.6 The Commission recommended that if, however, the presiding officer is of the view that the sentence is inappropriate and that he or she would have imposed either a lesser or a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the parties of such lesser sentence he or she considers to be appropriate. Whereupon either the prosecutor or the accused may abide by the agreement or withdraw from it the agreement, in which event the trial shall proceed *de novo* before another presiding officer, as the case may be: Provided that the accused may waive his or her right to be tried before another presiding officer. A sentence imposed by any court in terms of an agreement under this section shall not be subject to appeal.¹⁴

17.2.7 The Draft Bill on **Sentencing Agreements**¹⁵ which was developed by the South African Law Commission, from the **Fourth Interim Report on Sentencing Agreements** is currently in the Justice Portfolio Committee process prior to being enacted.

17.2.7 The option of plea bargaining is frequently viewed by the public as “being soft of criminals”. There exists a very real tension between the public desire to protect the victim and the public demand to impose a heavy sentence on sex offenders. What is often not appreciated by the public is that:

- Due to the nature of and evidence in sexual offence trials it is often difficult to secure convictions. In the face of these factors and when the prosecutor has doubts about the

13 **Fourth Interim Report on Sentence Agreements** at page 80.

14 **Fourth Interim Report on Sentence Agreements** at p 80 -81.

15 The draft Bill was handed to the Justice Portfolio Committee on the 21 October 2001.

strength of the case, it is deemed to be in the interests of safety that a plea of guilty to a less serious charge be accepted rather than running the risk of an acquittal. Should an accused be acquitted he or she is outside the system of criminal justice. This may be highly dangerous, and even more so when the offence is intra-familial and the custodian parent is the accused person.

- When the complainant is young or particularly vulnerable it may be in their long term interests to avoid having to give evidence and in such a case plea bargaining can protect them and promote their recovery.
- Plea bargaining could make an important contribution to the acceleration of the criminal justice process.¹⁶
- That it is imperative to bring the offender into the system.

17.2.8 No recommendations are made in regard to the substance of plea bargaining as this has been dealt with in the South African Law Commission's Fourth Interim Report on Simplification of Criminal Procedure and the Draft Bill.

17.3. Recommendations

The Commission recommends that:

- 1. Prosecutors handling sexual offence cases should receive training on plea bargaining and innovative sentencing options aimed at community protection.**
- 2. Provision should be made in the plea bargaining process to consult the complainant, or in the case of a minor, the minor complainant and his or her parent, guardian or *person in loco parentis*.**

¹⁶ South African Law Commission **Interim report on the Simplification of Criminal Procedure: Project 73** August 1995 at paras 10.79 - 10.84.

CHAPTER 18**DISCLOSURE AND PRODUCTION OF PERSONAL RECORDS****18.1 Introduction**

18.1.1 Disclosure touches the essence of the right to a fair trial. The primary aim of disclosure is to make all information relevant to the trial available in order to determine the truth. To achieve this aim, the State and the accused should preferably play open cards. We start our discussion with prosecutorial disclosure, followed by defence disclosure, and end it by dealing with the production of personal records.

18.2 Prosecutorial disclosure**18.2.1 Introduction and current position**

18.2.1.1 The police docket normally consists of three sections: section A - witnesses' statements taken by an investigating officer; expert reports and documentary exhibits; Section B - internal reports and memoranda; and section C - the investigation diary. The question under consideration is whether the accused should have access to the police docket or parts thereof, and if so, under what circumstances?

18.2.1.2 This question was addressed by the Constitutional Court in **Shabalala v The Attorney-General of the Transvaal & Another**¹ where the Court *inter alia* considered whether or not the common law privilege pertaining to the contents of police dockets as defined in **Steyn's**² case, which amounted to a "blanket docket privilege", was consistent with the Constitution. The Court found that the blanket docket privilege expressed in **R v Steyn** was inconsistent with the Constitution to the extent to which it protected documents in a police docket from disclosure, in all circumstances, regardless of whether or not such disclosure was justified for the purposes of enabling the accused to exercise his rights to a fair trial properly in terms of section 25(3) of the Constitution.

18.2.1.3 The Court held that the right to a fair trial would ordinarily include access to the statements of witnesses (whether or not the State intended calling such witnesses) and such of the contents of a police docket as were relevant in order to enable an accused person to exercise that right properly. The prosecution might, in a particular case, be able to justify the denial of such access on the grounds that it was not justified for the purposes of a fair trial. This would depend on the circumstances

¹ 1996 (1) SA 725 (CC).

² 1954 (1) SA 324 (A).

of each case. The Court found that in the case of statements of witnesses made in circumstances where there was a reasonable risk that their disclosure might constitute a breach of State secrets, methods of police investigation, the identity of informers and communications between legal advisor and his or her client, it might be proper to protect the disclosure of such statements and the State may succeed in establishing that such restriction was reasonable, justifiable in an open and democratic society based on freedom and equality and that it was necessary and did not negate the essential content of the right to a fair trial. The Court in each case had to exercise a proper discretion balancing the accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice.³

18.2.1.4 Part 14 of the Policy Directives of the National Director of Public Prosecutions (NDPP) regulates the disclosure of information contained in the docket. These directives state that the NDPP will only entertain a defence application for access to the docket once the investigation has essentially been completed. In keeping with the **Shabalala** judgement the directives provide⁴ that access may be opposed where -

- (a) there is a real risk that the identity of an informer may be disclosed;
- (b) State secrets may be revealed;
- (c) State witnesses may be intimidated;
- (d) the proper ends of justice may be impeded;
- (e) policing methods and investigative techniques may be disclosed; or
- (f) confidential co-operation between various police forces may be revealed.

18.2.1.5. In summary the answer to the question posed in paragraph 1.1 is that ordinarily, an accused person is entitled to have access to at least the statements of prosecution witnesses as found in Section A of the docket, but the prosecution may, in a particular case, be able to justify the denial of such access on grounds that it is not justified for the purposes of a fair trial.

18.2.2 Comparative analysis

18.2.2.1 England⁵ and Victoria have both implemented statutory regimes requiring general pre-trial disclosure by the prosecution. In criminal trials in the Supreme Court of Western Australia disclosure is required by rules of court. In New South Wales disclosure is regulated by a combination of common law rules, legislation, guidelines issued by the Director of Public Prosecutions, rules issued by the Bar

³ Par 55, read with par 40 at 751 E-H and 745 A-D.

⁴ Par 3.

⁵ **Bryant v Dickson** (1946) 31 Cr.App.R.146; **Dallison v Caffery** (1961) 1 Q.B. 348 as referred to in <http://www.lawnet.com.au/journal/vol1/congress/bugg.html> on 00/09/19.

Association and the Law Society and standard practice directions issued by the Supreme Court of New South Wales.⁶

18.2.2.2 The Canadian Attorney-General's Advisory Committee on Charge Screening identified the advantages to be obtained from timely and full disclosure as follows:⁷

Timely and full disclosure by Crown Counsel, when diligently utilised by the Defence, benefits both the accused and the administration of justice as a whole. Among the benefits are ... (a) the resolution of non-contentious and time consuming issues in advance of the preliminary hearing or the trial, which ensures the most efficient use of Court time; (b) the waiver or shortening of preliminary hearings and the shortening of trials; and (c) early resolution of cases, including, where appropriate, the entry of pleas of guilty or the withdrawal of charges.

18.2.2.3 Billy Kesler⁸ explains the importance and process of prosecutorial disclosure of evidence to the defence in the United States of America as follows:

Disclosure of evidence is vital to the assurance of a fair trial in the American Advocate system. The duty of the prosecutor to disclose exculpatory evidence is derived Constitutionally from the 5th and 14th Amendments. The 5th Amendment states that "No person shall ... be deprived of life, liberty, or property without due process of law." The 14th relays this to the states. Due process has been used to require disclosure. Disclosure has gone through a gradual development through the Supreme Court. **Brady v Maryland** is the first case where disclosure was established. The court held that the prosecution had a duty to disclose all evidence that the defense requests. In **US v Agurs**, the court held that evidence not requested by the defense was still required because of the exculpatory nature of the evidence. If it has bearing on the case to sway the verdict either way, there is a duty to disclose the evidence. Finally in **US v Bagley**, the court consolidated all disclosure efforts by creating a single standard of materiality. It held "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different". If the evidence is important to the defense, the duty to disclose is there. North Carolina statutes also apply the duty of disclosure on its prosecution. The defense is allowed to inspect the specified documents, tangible objects, etc. Disclosure is also required by the Jenck Act and Federal Criminal Code 16.

18.2.2.4 Under Rule 16(a)(1) of the Federal Rules of Criminal Procedure,⁹ and upon request of a defendant the following evidence is subject to disclosure in the USA: (A) Statement of Defendant . . . (B) Defendant's Prior Record . . . (C) Documents and Tangible Objects. The Government is obliged to permit the defendant to inspect and copy or photograph books, papers, documents, photographs,

⁶ New South Wales Law Reform Commission Discussion Paper 41 **The Right to Silence** Sydney 1998

⁷ As quoted by <http://www.lawnet.com.au/journal/vol1/congress/bugg.html> on 00/09/19.

⁸ As quoted by <http://instruct.unc.edu/wcb/schools/5/3225/kegerton/eng30p2972/forums/forum1/.../13/htm> on 00/09/19.

⁹ As quoted by http://www.abanet.org/antitrust/committees/criminal/new_problems.html on 00/09/19.

tangible objects, building or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defence or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. (D) Reports of Examinations and Tests . . . (E) Expert Witnesses . . .

18.2.2.5 The Rule also expressly describes materials not subject to disclosure. These materials are described as follows:

Except as provided in paragraphs (A), (B), (D) & (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses except as provided in 18 U.S.C. Sec 3500 (the Jencks Act).

The Jencks Act requires disclosure and production of statements made by government witnesses. These statements are only required to be produced after the witness has testified. The Act is designed to provide the defendant with information to be used for impeachment of that witness.¹⁰

18.2.2.6 Article 67(2) of the **International Criminal Court statute** states that the prosecutor shall, as soon as possible, disclose to the defence "evidence in the prosecutor's control which he or she believes shows or intends to show the innocence of the accused, or mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." Although the rule is that evidence which "in any way" shows or tends to show innocence etc, ought to be disclosed, legitimate concerns about the disclosure of information being seriously detrimental to ongoing investigations, or to the interests of victims or witnesses, can and should be addressed.¹¹ It is clear that the prosecutor has a duty to disclose sufficiently in advance of trial to allow for the adequate preparation of the defence.

18.2.3 Evaluation

18.2.3.1 When compared to foreign jurisdictions the foundation laid by the **Shabalala** case for prosecutorial disclosure seems to be generally accepted and applied. The general view is that the aim of disclosure is to afford an accused a fair trial. Prosecutors are appointed to assist in the ascertainment of truth, not simply to obtain a conviction. For this reason prosecutors should not object to the inspection of the documents simply because they may provide the accused with the opportunity of discovering a truth and pursuing a proper and fruitful course in cross examination. Part 14 of the Policy Guidelines of the NDPP adequately regulates disclosure by the prosecution. **It is deemed unnecessary to embody**

¹⁰ [Http://www.abanet.org/antitrust/committees/criminal/new_problems.html](http://www.abanet.org/antitrust/committees/criminal/new_problems.html) at pp 6 on 00/09/19

¹¹ As quoted at <http://www.igc.org/hrw/campaigns/icc/prepcom-feb99.htm>.

these guidelines in legislation.

18.2.3.2 Whilst evaluating the concept of prosecutorial disclosure, two problematic issues related to disclosure have emerged. The first is that the investigation and charging process is undertaken by the police who in the end are not responsible for the prosecution and the second, the inadvertent and presently unavoidable inclusion of unnecessary personal information as part of the documentation which is disclosed to the defence.

18.2.3.3.1 The information gathered, the source of that information and the circumstance in which it was obtained are all matters to which the police and few others are privy. The question of protection offered to witnesses or other facts which will in some way affect the weight or credibility of evidence are matters which in some cases are only gleaned by the prosecutor after close questioning of the investigating officer. The prosecution may be unaware of the existence of material gathered by the investigating officer unless it is specifically addressed within the contents of the docket. The prosecutor relies upon the investigating officer for details of the information and evidence gathered and in turn the defence will rely on the prosecution to impart that information. Neither the defence nor the prosecution participate in the investigative process and, more importantly, they have no oversight of that process as it unfolds. Issues which may be relevant at trial may never arise or even occur to the investigator when the investigation is conducted in isolation and, in many instances, without scrutiny by the prosecution.

18.2.3.3.2 In order to ensure that full disclosure has been made by the police, thereby ensuring that the prosecution is able to make full disclosure to the defence, prosecution guidelines were published to this effect by the Director of Public Prosecutions for New South Wales.¹² In order to counter-balance this provision, a provision which assures the police that sensitive material will not be disclosed to the defence without prior consultation has also been included in the guidelines. The provisions read as follows:

Disclosure by Police

In matters referred by the Commissioner of Police to the Director of Public Prosecutions for criminal prosecution, Police should, in addition to providing the brief, notify the Director of Public Prosecutions of the existence of, and where requested disclose, all other documentation, material and other information, including that concerning any proposed witness, which documentation, material and other information might be of relevance to either the Prosecution or the Defence in relation to the matter and certify that the Director of Public Prosecutions has been notified of all such documentation, material and other information.

and

Consultation with Police prior to Disclosure

In every case where a lawyer who is prosecuting on behalf of the Director of Public Prosecutions

¹² [Http://www.lawnet.com.au/journal/vol1/congress/bugg.html](http://www.lawnet.com.au/journal/vol1/congress/bugg.html) at p4 as of 00/09/19.

receives from the Police or any other person, directly or indirectly, sensitive information or material, that lawyer should not disclose that information or material to the Defence without first consulting with the Police officer in charge of the case. The purpose of the consultation is to give that officer the opportunity to raise any concerns as to such disclosure. Accordingly, the officer should be allowed reasonable opportunity to seek advice if there is any dispute. . .

18.2.3.3.3 In Chapter 4 above joint intervention in *inter alia* the investigation phase is recommended. If this recommendation is accepted the prosecution will be closely involved in the investigation phase. **For the purposes of certainty and clarity it is recommended that provisions similar to those in the New South Wales guidelines be included in the Policy Guidelines of the National Director of Public Prosecutions.**

18.2.3.4.1 The second point in issue is that material which is disclosed may include personal information which, if omitted, would not detract from the content of the document. For example, each statement contains the name, particulars and signature of the person making the statement. In the event of a statement being disclosed to the defence, some of these particulars, which are in essence not necessary for the exercise of the accused's constitutional rights, are also disclosed to the defence.

18.2.3.4.2 After discovering that certain accused persons in places of detention had come to be in possession of copies of statements with personal particulars of complainants in serious sexual offences, the Metropolitan Police Service in London adapted the form used to take affidavits in order to protect the complainant and, or witnesses when copies of their statements were made available to Defence Counsel and or the accused.¹³ The only particulars on the front face of the statement are the full names of the witness, the age if under 21, and a perjury clause. The residential address and personal particulars of the witness are recorded on the reverse side of the first page of the statement. A calendar with dates of the availability of the witness are also reflected. Whenever the Crown Prosecution Service is requested to furnish copies of statements, the personal particulars are not disclosed.

18.2.3.4.3 It is contended that as a standard rule and especially in cases where the accused is unaware of the witnesses' particulars, for example his or her marital status, identity number, address or contact details,¹⁴ this information should not be disclosed to the defence. As a declaration identifying the deponent and confirming the truthfulness of the statement are essential, it is suggested that these details be brought about on the back of the sheet of paper on which the statement is made. These details would include the witnesses contact details which may include his or her residential or work

¹³ Information kindly provided by Director S Schutte, National Detective Services: SAPS.

¹⁴ An example would be a sexual offence committed by a stranger or where the victim changes his or her address.

numbers or an alternative contact number.¹⁵ When photocopies of the statements are made for the purposes of disclosure, only the front of the page would be photocopied allowing the defence to ascertain the nature and content of the statement while at the same time ensuring the witness's privacy and protection. It is also suggested that the age of the witness, if he or she is under 18 years of age, be brought about on the front of the statement. This will indicate whether the prosecutor needs to automatically make provision for protective measures for a child witness.

18.2.3.4.4 In **S v Ntoae and Others**¹⁶ Judge Navsa held that in exceptional cases a Court may find that it is in the interests of justice that the identity of a witness, sought to be called by the State, should be withheld from the accused and his or her representative. In terms of section 153 of the **Criminal Procedure Act** a Court may grant an order to this effect. In the abovementioned case an order was granted allowing the prosecution to withhold the statements of two intended witnesses until they testified in chief. Additionally the Court ordered that the two State witnesses may testify behind closed doors and that their true full names may be withheld from the accused and their legal representatives. The witnesses were instructed to write their true and full names on a document which would be made available to the Court before testifying. Because of increasing levels of violence against witnesses, a Court may be more prepared than previously to allow the non-disclosure of personal information of witnesses and thereby allowing them to give their evidence anonymously.¹⁷

18.2.3.5 **In summary it is recommended that the Policy Guidelines of the NDPP be amended to ensure that full disclosure has been made by the police, thereby ensuring that the prosecution is able to make full disclosure to the defence. In order to counter-balance this provision, a provision which assures the police that personal material will not be disclosed to the defence without prior consultation must also be included. It is also recommended that personal particulars which do not adversely affect the accused's right to a fair trial should not be divulged to the defence by way of a witnesses's statement and testimony. It is also suggested that the age of the witness, if he or she is under 18 years of age, be brought about on the front of the statement. This will indicate whether the prosecutor needs to automatically make provision for protective measures for a child witness. Furthermore the Commission recommends that the**

¹⁵ This would be the case where the witness may not want to inform his or her spouse or family members of the sexual attack.

¹⁶ 2000 (1) SACR 17 (W).

¹⁷ Fear of reprisal and repeat victimisation are very real. Seven year old Mamokgethi Malebana was abducted and murdered after Daniel Mabote had been charged of rape and was let out on bail. Many sexual offences are perpetrated by gang members. Members often are known by nick names and may be more willing to testify against other members in their gang knowing that they will be more adequately protected.

provisions contained in section 153 of the Criminal Procedure Act be invoked more often in order to protect witnesses, especially victims of sexual offences where a real possibility exists for revictimisation or recurring violence.

An example of the proposed front and back of the recommended statement follows:

Witness Statement

Statement of.....

Age if under 18(If over 18 insert 'over 18')

This statement (consisting ofpages signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

Dated the Day of 2001

Signature

1.

Signature.....

Signature witnessed by

-2-

Full names.....

Home address:

.....

Home Telephone No Work telephone No.

Occupation Date and place of birth

Height ID No.....

Dates to be avoided. Delete dates of non-availability of witness (not police officer)

Month of

Month of

1	2	3	4	5	6	7	1	2	3	4	5	6	7
8	9	10	11	12	13	14	8	9	10	11	12	13	14
15	16	17	18	19	20	21	15	16	17	18	19	20	21
22	23	24	25	26	27	28	22	23	24	25	26	27	28
29	30	31					29	30	31				

Contact point, if different from above

Address

.....

Telephone No.....

Statement taken by (print name)

Station.....

18.3.1 Introduction and current position

18.3.1.1 While the court has an interest in ensuring that the proceedings are fair to an accused, it should also be concerned with ensuring that the truth is determined, and that proceedings are efficient and as cost effective as possible. Courts are expected to cope with an ever increasing volume of work and the length of trials is tending to increase.

18.3.1.2 Although there is presently no general duty on the accused to disclose his or her defence, there are certain specific circumstances in which the accused is, in reality, called upon to do so, for example:

- An alibi defence might be considerably weakened if the accused fails to disclose it in advance.¹⁸
- The defence of insanity must, in effect, be disclosed in advance.¹⁹
- There are certain special defences which the prosecution is not required to exclude unless they are “raised” by the accused, whether before the trial or in the evidence.²⁰ For example, an accused should lay a foundation for a defence of sane automatism.²¹ In **S v Trickett**,²² it was held that although the prosecution has a burden of disproving a defence of automatism not caused by mental illness or mental defect, this burden does not operate until the defence has been put in issue. Similarly, in **S v Delport**,²³ it was said that the state need not negate provocation unless the evidence indicates that it is a possible factor in the case.²⁴

18.3.1.3 The critical question is whether an obligation to disclose his or her defence could be imposed on an accused while at the same time ensuring that the accused receives a fair trial and that the rights afforded to him or her by the Constitution are upheld, more specifically the right to be presumed innocent, to remain silent, and not to testify during the proceedings, and the right not to be compelled to give self-incriminating evidence.

¹⁸ **R v Masehele** 1944 AD 571; **S v Zwayi** 1997 (2) SACR 772 (CkHC).

¹⁹ Whether this reverse onus will withstand constitutional scrutiny is an open question.

²⁰ AV Lansdown & J Campbell **South African Criminal Law and Procedure** vol v Criminal Procedure and Evidence (1982) at 910.

²¹ See generally Schmidt 1973 **SALJ** 329; **S v Potgieter** 1994 (1) SACR 61 (A).

²² 1973 (3) SA 526 (T) at 532.

²³ 1968 1 PH H172 (A).

²⁴ See also **S v Kalagropoulos** 1993 (1) SACR 12 (A); **S v Cunningham** 1996 (1) SACR 631 (A).

18.3.2. Comparative analysis

18.3.2.1 Australia

18.3.2.1.1 Australia has undergone a shift towards recognising and enforcing defence disclosure. According to Damian J. Bugg Q.C., Director of Public Prosecutions for Tasmania, “the Criminal Justice System can no longer tolerate full and faithful adherence to an all embracing right to silence. Failure to resolve what is in issue at a criminal trial necessarily results in longer trials, confused juries and greater inconvenience and expense to victims, witnesses, Police, prosecuting authorities and Courts.”²⁵

18.3.2.1.2 The effectiveness of current methods of case flow management is limited because, among other things, under rules such as those that exist in South Australia, the court has no power to require the defence to disclose the nature and extent of the defence case.²⁶

18.3.2.1.3 In Victoria pre-trial disclosure is embodied in legislation. Provision is made for mutual compulsory disclosure requirements, although a higher standard of disclosure is required of the prosecution. The defence is required to respond to the prosecutorial disclosure by indicating which elements of the offence are admitted. Thereafter, the timetable for disclosure is set by the court at a pre-trial hearing. The prosecution must file in court and serve on the defence a case statement. This includes a summary of the facts and inferences the prosecution will seek to prove at trial, copies of prosecution witness statements, including expert witnesses, a list of exhibits the prosecution intends to produce, copies of documentary exhibits and statements of law the prosecution intends to rely on. The prosecution must also give the defence a reasonable opportunity to inspect prosecution exhibits. The defence is required to file and serve a defence response replying to the matters raised in the prosecution case statement, providing copies of expert witness statements and including statements of law the defence intends to rely on. The defence is not required to disclose the identity of its witnesses, other than expert witnesses. The consequences of non-compliance with the regime also differ for the prosecution and the defence. Non-compliance does not affect the admissibility of defence evidence, but the prosecution is not permitted to introduce evidence which was not disclosed, or departs from the disclosed prosecution case, without the leave of the court.²⁷ The defence is also required to disclose intended alibi evidence to the prosecution.

²⁵ [Http://www.lawnet.com.au/journal/vol1/congress/bugg.html](http://www.lawnet.com.au/journal/vol1/congress/bugg.html)

²⁶ [Http://www.afp.gov.au/publica/platypus/dec98/defence.htm](http://www.afp.gov.au/publica/platypus/dec98/defence.htm)

²⁷ New South Wales Law Reform Commission Discussion Paper 41 **The Right to Silence** May 1998.

18.3.2.1.4 Victoria has introduced statutory sanctions for non-compliance. Section 15 of the **Victorian Crimes (Criminal Trials) Act** 1993 enables the presiding judge or, with leave, a party to comment if the accused or the prosecutor (with leave) introduces evidence at the trial which was not disclosed prior to the trial and which represents a departure from the case disclosed prior to trial. Section 19 empowers the court to award costs against either party or a party's counsel or solicitor personally if the court is satisfied there has been an unreasonable failure by the party or the party's counsel or solicitor to comply with the Act or an order made under the Act.

18.3.2.1.5 Section 5 of the **Sentencing Act** 1991 (Vic.) provides a basis for a limited sanction in respect of sentence. If, having declined to concede or agree facts or elements of an offence, the defence subsequently does not seriously contest the evidence, the judge may have regard to that matter in sentencing as indicating a lack of remorse on the part of the offender.²⁸

18.3.2.1.6 Defence disclosure requirements also apply in respect of alibi evidence in trials for indictable offences in the Northern Territory, South Australia, Tasmania and the Australian Capital Territory.²⁹

18.3.2.1.7 In Western Australia the defence is required to provide disclosure by way of a statement indicating which facts alleged by the prosecution will be admitted and which facts will be disputed, the legal grounds of any defence which will be relied on and copies of statements of any expert witnesses whom the defence proposes to call. In criminal trials for indictable offences, the defence is also required by legislation to disclose intended alibi evidence to the prosecution.

18.3.2.1.8 In criminal trials for indictable offences in Queensland, the defence is required to disclose intended alibi evidence to the prosecution. If either the prosecution or the defence intends to lead expert evidence at trial, they are required to give the other party written notice of the name and finding or opinion of the expert report, as soon as practicable before the trial.

18.3.2.1.9 In the territories where defence disclosure is required, the trial judge is empowered to comment to the jury on non-compliance with any requirement inviting the jury to draw inferences which are adverse to the party in default.

18.3.2.2 **United Kingdom**

²⁸ [Http://www.afp.gov.au/publica/platypus/dec98/defence.htm](http://www.afp.gov.au/publica/platypus/dec98/defence.htm) .

²⁹ New South Wales Law Reform Commission Discussion Paper 41 **The Right to Silence** May 1998 at page 69.

18.3.2.2.1 All alleged offences in England, Wales and Northern Ireland into which an investigation has commenced are subject to a general, legislative pre-trial disclosure. The prosecution is required to disclose any material to the defence which the prosecution considers might undermine the prosecution's case. This is known as "primary disclosure". Primary disclosure is required as soon as reasonably practical. In turn, in trials for indictable offences, the defence is required to provide the court and the prosecution with a defence statement setting out the general nature of the defence and the matters which the defence will dispute, giving reasons. If the defence includes alibi evidence, particulars are required.³⁰ The court, or with the leave of the court, the prosecution, is permitted to comment to the jury on non-compliance with the defence disclosure obligations, and the jury is permitted to draw such adverse inferences as it considers appropriate. If either the prosecution or the defence intends to lead expert evidence at trial, they must provide a copy of the expert witness's statement to the other party as soon as possible.

18.3.3 Evaluation

18.3.3.1 Numerous benefits weigh in favour of legislating for compulsory defence pre-trial disclosure. It could be argued that compulsory defence pre-trial disclosure would markedly improve the efficiency of the criminal justice system by early identification of the issues that are actually in dispute, so that the prosecution does not waste time and resources preparing evidence in relation to issues which the defendant does not dispute. It could also be argued that resolving non-contentious issues before trial would result in more efficient use of court time, the time of counsel and less inconvenience to witnesses whose evidence is not in dispute. Adjournments in response to unexpected developments in the course of the trial could be eliminated, thereby shortening trials. It could also discourage the pursuit of weak prosecutions, reducing congestion in the court system. Professor Schwikkard³¹ refers to additional benefits such as preventing the subsequent fabrication of false defences and the elimination of surprise enabling the state to investigate defence allegations properly and timeously.³²

18.3.3.2.1 Conversely, by embracing defence disclosure several fundamental constitutional principles may in turn be infringed. It could be argued that requiring the accused to provide information

³⁰ New South Wales Law Reform Commission Discussion Paper 41 **The Right to Silence** May 1998 at page 71.

³¹ South African Law Commission Discussion Paper 96 **Simplification of Criminal Procedure (A more inquisitorial approach to criminal procedure - police questioning, defence disclosure, the role of the judicial officers and judicial management of trials)** Project 73 Simplification of the Criminal Procedure 2001.

³² See also D Tanovich & L Crocker 'Dancing with Stinchcombe's Ghost: A Modern Proposal for Reciprocal Defence Disclosure' (1994) 26 CR (4th)333 as quoted by Schwikkard.

about the defence case before trial would be inconsistent with the principle that the burden of proving the accused's guilt is on the prosecution, which is required to establish guilt without any assistance from the accused. Compulsory defence pre-trial disclosure might also operate in practice as a form of compulsion on the accused which could be found to be inconsistent with the defendant's privilege against self-incrimination.³³ This would in turn be inconsistent with the presumption of innocence guaranteed in section 35(3)(h) of the Constitution. Additionally it would place a burden on defence resources - and it will in all probability be impossible for most unrepresented defendants to comply fairly and fully. Schwikkard adds to these objections by noting that the roles of the defence and prosecution are conceptually different, consequently the defence has no duty to assist the prosecution. She also notes the argument that defence disclosure will not necessarily lead to an increase in efficiency and quotes Leng in this regard:³⁴

[D]efence lawyers are unlikely to go out of their way to disclose every last detail. If that is the case, disputes may arise not only about whether disclosure has been made but also about its sufficiency. Where multiple defences are notified, their consistency or otherwise may be disputed and for all cases the nature of the permissible inferences must be decided. If the judge decides many of these issues against defendants, a spate of appeals may be expected. It also seems very improbable that by multiplying the issues to be determined at pre-trial hearings, one can reduce the time spent in court.

18.3.3.2.2 Schwikkard *inter alia* notes that the unrepresented accused will be disadvantaged by compulsory defence disclosure due to insufficient skill and knowledge regarding the most advantageous method for compliance or simply not knowing whether to comply at all. She further notes that increasing pressure on the accused to speak undermines the right to privacy and dignity, that there is no appropriate means of compelling defence disclosure and that an adverse inference from the failure to disclose a defence has no rational basis. She quotes Easton³⁵ who highlights the fact that the prosecution may tailor evidence to meet the defence case and that defence disclosure has no significant impact on conviction rates.

18.3.3.3 When considering whether defence disclosure should be regulated, consideration should also be given to the stage at which it should be done. The Simplification of the Criminal

³³ Contrary to Section 35(3)(j) of the Constitution.

³⁴ R Leng 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure' (1995) **Criminal Law Review** at 705. R Mosteller 'Discovery Against the Defence: Tilting the Adversarial Balance' (1986) 74 **California Law Review** 704 at 705 writing in the American context also notes that increasing the defendants duties of disclosure has resulted in an increase in appeals based on challenges to discovery procedures.

³⁵ S Easton **The Case for the Right to Silence** 2 ed (1998) 53.

Procedure Project Committee³⁶ states that the object which is to be served by defence disclosure varies according to the stage at which it is required to be made. According to their draft discussion document, defence disclosure during the investigative phase serves to curtail the investigation, produce evidence that might contribute to a conviction and exclude possible defences (such as an alibi). Defence disclosure after indictment serves only to curtail the length of the trial. Bearing in mind that sexual offences are often committed without witnesses being present and that drawn out trials are especially traumatic to such victims, it can safely be said that either result would be beneficial.

18.3.3.4 In considering whether obliging an accused to disclose his or her defence in the investigative phase would be contrary to section 35(1) of the Constitution which guarantees to every person who is arrested for allegedly committing an offence the “right to remain silent ... and not to be compelled to make any confession or admission that could be used in evidence against that person”, the Simplification of the Criminal Procedure Project Committee³⁷ proposes the alternative options of drawing an adverse inference from the accused’s silence or not drawing an adverse inference when an accused fails to disclose.

18.3.3.5.1 With regard to the first option the Simplification of the Criminal Procedure Project Committee makes the following legislative proposals:

INFERENCES FROM ACCUSED’S SILENCE

Effect of accused’s failure to mention facts when questioned or charged

- 207A.** (1) Where in criminal proceedings evidence is given that the accused-
1. at any time before he or she was charged with an offence, on being questioned under warning and on being informed of the provisions of subsection (2) by a police officer in an attempt to determine whether or by whom the offence had been committed, failed to mention any fact relied on in his or her defence in such criminal proceedings; or
 2. on being charged with the offence or officially informed by such police officer that he or she might be prosecuted for the offence and that the court might draw an inference contemplated in subsection (2), failed to mention any such fact, being a fact which in the circumstances existing at that time the accused could reasonably have expected to mention when so questioned, charged or informed, the provisions of subsection (2) shall apply.

³⁶ South African Law Commission Discussion Paper 96 **Simplification of Criminal Procedure (A more inquisitorial approach to criminal procedure - police questioning, defence disclosure, the role of the judicial officers and judicial management of trials)** Project 73 Simplification of the Criminal Procedure 2001.

³⁷ Ibid at page 57.

- (2) Whenever in criminal proceedings the court has to decide whether -
 (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
 (b) the accused is guilty of the offence charged; or
 (c) the accused is guilty of another offence which constitutes a competent verdict on the offence charged; or
the court may draw such inference from the accused's failure contemplated in subsection (1), as may be reasonable and justifiable in the circumstances.
- (3) Subject to any directions by the court, evidence tending to establish the failure referred to in subsection (1), may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.
- (4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.
- (5) This section does not-
 (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct of which he or she is charged, in so far as evidence thereof would be admissible apart from this section; or
 (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

Effect of accused's silence at trial

- 207B.** (1) This section applies in criminal proceedings in respect of any accused who has attained the age of 14 years, but does not apply -
 (a) where the accused's guilt is not in issue
 (b) where it appears to the court that the physical or mental condition of the accused makes it undesirable for him or her to give evidence;
 (c) if, at the conclusion of the case for the prosecution, the accused or his or her legal adviser informs the court that the accused will give evidence.
- (2) Where the court has asked the accused whether he himself or she herself intends to give evidence contemplated in section 151(1)(b), and-
 (a) if the accused answers in the negative but decides, after evidence has been given on behalf of the defence, to give evidence himself or herself; or
 (b) if the accused chooses not to give evidence, or having taken the oath or made an affirmation, without good cause, refuses to answer any question,
the court may draw such inference from the accused's conduct as may be reasonable and justifiable in the circumstances.
- (3) In determining whether an accused is guilty of the offence charged or of another offence which constitutes a competent verdict on the offence charged, the court may draw such inferences from the accused's decision and failure referred to in subsection (2)(a) and (b), as may be reasonable and justifiable in the circumstances.
- (4) This section does not render the accused compellable to give evidence on his or her own behalf, and he or she shall accordingly not be guilty of contempt of court by reason of his or her failure to do so.
- (5) For the purposes of this section an accused who, having taken the oath or make an

affirmation, refuses to answer any question shall be taken to do so without good cause unless -

- (a) he or she is entitled to refuse to answer the question on the ground of privilege;
or
- (b) the court in the exercise of its general discretion, excuses the accused from answering it.

Effect of the accused's failure or refusal to account for objects, substances or marks

207C. (1) (a) Where a person is arrested by a police officer, and there is-

- (i) on his or her person;
- (ii) in or on his or her clothing or footwear;
- (iii) otherwise in his or her possession;
- (iv) in any place in which he or she is at the time of the arrest,

any object, substance or mark, or there is any mark on such object, and that police officer reasonably believes that the presence of the object, substance or mark may be attributable to the person arrested in the commission of an offence specified by the police officer, the police officer may inform the arrested person that he or she so believes and requests that person to account for the object, substance or mark.

- (b) If the arrested person referred to in paragraph (a), fails or refuses to account for the object, substance or mark, the provisions of subsection (2) shall apply in any criminal proceedings against that person.

(2) Whenever in criminal proceedings the court has to decide whether-

- (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
- (b) the accused is guilty of the offence charged; or
- (c) the accused is guilty of another offence which constitutes a competent verdict on the offence charged,

the court may draw such inference from the accused's failure or refusal contemplated in subsection (1), as may be reasonable and justifiable in the circumstances.

(3) Subsections (1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection (1)(a), what the effect of this section would be if he or she failed or refused to comply with the request.

(4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.

(5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for the presence of an object, substance or mark, or from the condition of clothing or footwear, which could properly be drawn apart from this section.

Effect of accused's failure or refusal to account for presence at a particular place

207D. (1) Where-

- (a) a person arrested by a police officer was found by him or her at a place at or about the time of the offence for which the person was arrested is alleged to have been committed; and
- (b) the police officer reasonably believes that the presence of the person at that place and time may be attributable to the person's participation in the commission of the offence; and
- (c) the police officer informs the person that he or she so believes, and requests the person to account his or her presence; and
- (d) the person fails or refuses to do so,
 then, if in any criminal proceedings against that person, evidence of those matters is given, the provisions of subsection (2) shall apply.
- (2) Whenever in criminal proceedings the court has to decide whether-
- (a) the accused may be discharged at the close of the case for the prosecution in terms of section 174;
- (b) the accused is guilty of the offence charged; or
- (c) the accused is guilty of another offence which constitutes a competent verdict on the offence charged,
the court may draw such inference from the accused's failure or refusal contemplated in subsection (1), as may be reasonable and justifiable in the circumstances.
- (3) Subsections (1) and (2) do not apply unless the accused was informed in ordinary language by the police officer when making the request referred to in subsection (1), what the effect of this section would be if he or she failed or refused to comply with the request.
- (4) This section also applies to questioning by persons, other than police officers, who are charged with the duty of investigating alleged offences, conducting inquiries in respect of the commission or attempted commission of suspected offences or the charging of offenders.
- (5) This section does not preclude the drawing of any inference from any such failure or refusal of the accused to account for his or her presence at a place which could properly be drawn apart from this section."

Section 151 of the principal Act is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

- "(b) The court shall also ask the accused whether he himself or she herself intends giving evidence on behalf of the defence, and [-
- (i)] if the accused answers in the affirmative, he or she shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence [; **or**
- (ii) **if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances]."**

18.3.3.5.2 The second option, i.e. not drawing an adverse inference where an accused chooses not to disclose, reflects the *status quo*.

18.3.3.6 In evaluating defence disclosure after the indictment but before pleading, the

Simplification of the Criminal Procedure Act Committee's provisional view is that no legislative intervention is necessary. However, the Simplification of the Criminal Procedure Act Committee includes a proposal which inserts a "notice of alibi", "notice of allegation that accused is by reason of mental illness or mental defects not criminally responsible for the offence charged", "notice of intention to raise certain defences"; and a "notice to call expert witnesses" for general comment.

18.3.3.7 The Simplification of the Criminal Procedure Act Project Committee also takes disclosure a step further by suggesting that all the material information which the prosecution is required to disclose to the defence, in advance of trial, should in terms of the **Shabalala** judgement be made available to the judicial officer. As the prosecution and the defence are fully aware of the nature of the evidence which will be advanced by the prosecution, there is no good reason why that material should not equally be made available to the judicial officer. It will enable the judicial officer to make an informed decision as to what evidence is available to the prosecution; the extent to which witnesses materially depart from previous statements; and the extent to which the power to call witnesses might usefully be exercised.³⁸ They sound a word of caution though, that it should be clear that there are no grounds for the information encompassed by that material to become admissible in evidence merely because it has been placed before the judicial officer.

18.3.3.8 Although the Simplification of the Criminal Procedure Act Project Committee is of the opinion that legislative amendments regarding disclosure are not necessary, they include amendments to the **Criminal Procedure Act** regarding disclosure for comment. As they have grouped prosecutorial and defence disclosure together, their proposal will be reflected as such:³⁹

(a) The following Chapter is hereby inserted in the principal Act after section 104:

"CHAPTER 14A

PROSECUTION AND DEFENCE DISCLOSURE

³⁸ South African Law Commission Discussion Paper 96 **Simplification of Criminal Procedure (A more inquisitorial approach to criminal procedure - police questioning, defence disclosure, the role of the judicial officers and judicial management of trials)** Project 73 Simplification of the Criminal Procedure 2001.

³⁹ Although the Simplification of the Criminal Procedure Act Committee proposes embodying prosecutorial disclosure in the **Criminal Procedure Act**, regard should be had to the discussion on prosecutorial disclosure above where the conclusion is reached that codification of this obligation is not deemed necessary. See par 3.4 in this regard.

Disclosure of material contained in police docket

- 104A.** (1) An accused may at any stage request the prosecution to disclose the following material in possession of the prosecution or contained in the police docket:
- (a) documents which tend to exculpate the accused;
 - (b) statements of witnesses, whether or not the prosecution intends to call such witnesses;
 - (c) any other material that is reasonably required to enable the accused to prepare his or her defence.
- (2) Copies of the documentation or material requested under subsection (1), shall be delivered to the accused or, where impracticable, the accused shall be allowed to inspect such documentation or material at the court: Provided that the accused may be denied access to the requested documentation and material or part thereof where-
- (a) it is not reasonably required in order to enable the accused to exercise his or her right to a fair trial;
 - (b) disclosure could lead to the disclosure of the identity of an informer or state secrets; or
 - (c) there is a reasonable risk that such disclosure may lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.

ALTERNATIVE PROPOSAL FOR paragraph (c):

- “(c) there is reason to believe that such disclosure may prejudice the course of justice, whether by interference with evidence or witnesses, or otherwise.”

Disclosure of documentation to court

- 104B** (1) The court may at any stage of the proceedings, for the purpose of assessing how to conduct the proceedings, require that the prosecution make available to it copies or permit inspection of the documentation or material which the accused would be entitled to receive in terms of section 104A: Provided that a statement by an accused in those proceedings shall not be made available to the court except where it has been admitted or proved; Provided further that unless the accused has already had access to the said documentation or material, the accused shall simultaneously receive the same copies or access.
- (2) The documentation or material received in terms of subsection (1) shall not form part of the record and shall have no evidential value unless it has been properly admitted or proved.

- (b) **Alternative proposal received for the new chapter 14A - Insertion of Chapter 14 A in Act 57 of 1977.**

“CHAPTER 14A**DISCLOSURE****Application of this Chapter and general interpretation**

- 104A.** (1) This Chapter shall apply where -
- (a) the accused is charged with a Schedule 1 offence-
 - (i) at a summary trial contemplated in section 75;
 - (ii) in an indictment contemplated in section 144;
 - (b) the accused pleads not guilty to the charge; and
 - (c) the accused is represented by a legal adviser.
- (2) Where more than one accused is charged, the provisions of this Chapter shall apply separately in relation to each of the accused.
- (3) References to material are to material of all kind, and includes in particular references to-
- (a) any information; and
 - (b) any object.
- (4) References to recording information are to putting it in a durable or retrievable form.

Disclosure by prosecutor

- 104B.** (1) (a) An accused may at any stage before any evidence of any particular charge has been led, in writing request the prosecution to disclose any prosecution material and the court before which a charge is pending may at any time before any evidence in respect of any charge has been led, direct the prosecutor to-
- (i) disclose to the accused any prosecution material which has not previously been disclosed to the accused which, in the prosecutor's opinion, might be detrimental to the case for the prosecution against the accused; or
 - (ii) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).
- (b) The court may, if necessary, adjourn the proceedings for a period determined by the court in order that the prosecutor discloses such material.
- (c) The court may, on application by the prosecutor and if good reasons exist for doing so, extend the period contemplated in paragraph (b)
- (2) for the purposes of this section prosecution material is material which-
- (a) is in the prosecutor's possession, and came into his or her possession in connection with the case against the accused; or
 - (b) is not in the prosecutor's possession, but which he or she has inspected in connection with the case against the accused.
- (3) (a) Where material consists of information which has been recorded in any form, the prosecutor shall disclose such information -
- (1) by securing that a copy is made of it and that the copy is given to the accused;
 - (2) if in his or her opinion it is not practicable or desirable, by allowing the accused to inspect such material at a reasonable time and at a reasonable place or by taking steps to secure that the accused is allowed to do so.
- (b) A copy of the material may be in such form as the prosecutor thinks fit and may not be in the same form as that in which the information has already been recorded.
- (2) (a) Where material consists of information which has not been recorded, the prosecutor shall disclose such information by securing that it is recorded in such form as he she thinks fit and-
- (i) by securing that a copy is made of it and that the copy is given to the accused;

- (ii) if in his or her opinion it is not practicable or desirable, by allowing the accused to inspect such material at a reasonable time and at a reasonable place or by taking steps to secure that the accused is allowed to do so.
- (b) A copy of the material may be in such form as the prosecutor thinks fit and may not be in the same form as that in which the information has already been recorded.
- (2) Where material does not consist of information, the prosecutor shall disclose such material by allowing the accused to inspect it at a reasonable time and at a reasonable place or by taking steps to secure that the accused is allowed to do so.
- (3) The prosecutor may refuse to disclose material under this section where the court, on application by the prosecutor, orders that -
 - (a) the material is not reasonably necessary in order to enable the accused to exercise his or her right to a fair trial;
 - (b) disclosure of the material would lead to the disclosure of the identity of an informer or state secrets; or
 - (c) there is a reasonable risk that such disclosure may lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.
- (7) Material shall not be disclosed under this section to the extent that-
 - (a) it has been intercepted in obedience to a direction issued under section 3 of the Interception and Monitoring Act, 1992 (Act No.127 of 1992); or
 - (b) it indicates that such a direction has been issued or that material has been intercepted in obedience to such a direction.

Disclosure by accused

- 104C.** (1) An accused -
- (a) may on his or her own accord; or
 - (b) shall, where the prosecutor complied or purports to comply with a direction referred to in section 104B,
- give a written defence statement to the court and the prosecutor.
- (1) The accused's defence statement contemplated in subsection (1)(b) shall -
 - (a) set out in general terms the nature of his defence;
 - (b) indicate the matters on which he or she takes issue with the prosecution; and
 - (c) set out, in the case of each such matter, the reason why he or she takes issue with the prosecution.
 - (3) (a) The court may, if necessary, adjourn the proceedings for a period determined by the court in order that the prosecutor discloses such material.
 - (b) The court may, on application by the accused and if good reasons exist for doing so, extend the period contemplated in paragraph (b).

Without transcribing the relevant sections *verbatim*, the amendment also addresses additional disclosure by the prosecutor, application by the accused for additional disclosure by the prosecution, the continuing duty of the prosecutor to disclose, failure or faults in disclosure by the accused, review of the decision not to disclose and confidentiality of disclosed information.

18.3.3.9 Section 115 of the **Criminal Procedure Act** facilitates defence disclosure if the defence chooses to make such disclosure. Compelling the accused to speak before a *prima facie* case has been established severely compromises the right to remain silent as a necessary corollary of the privilege

against self-incrimination. The undefended accused would be placed in an even more precarious position. **Based on the evaluation and the preliminary findings of the Simplification of the Criminal Procedure Act Project Committee, this Committee does not recommend legislative intervention at either the investigative stage or the stage after indictment but prior to pleading. The principle objection to requiring defence disclosure is that it will not be capable of being enforced in any meaningful way. The possibility of exposing the accused to any threat of punishment for failing to disclose his or her defence is a matter which warrants further discussion and we leave it to the Project Committee on the Simplification of the Criminal Procedure Act.**

18.4 The production of personal records of victims of sexual offences

18.4.1 Introduction and current position

18.4.1.1 There are presently four situations in which a witness in a trial may refuse to disclose or permit others to disclose admissible evidence.⁴⁰ These are:

- The privilege against self-incrimination;⁴¹
- Marital privilege;⁴²
- Privilege against answering questions which tend to show that the witness has committed adultery or *stuprum*;⁴³ and
- Legal professional privilege which is a privilege vested in the client, who may refuse to answer questions upon privileged matters him or herself and may also prevent his or her legal advisor or an agent of either of them from doing so.⁴⁴

18.4.1.2 At present, South African law does not regard communication between medical doctors and their patients or counsellors and their clients as privileged for the purposes of judicial proceedings.⁴⁵ A doctor⁴⁶ could, however, until recently not be compelled to produce medical and therapeutic records

⁴⁰ LH Hoffman & D Zeffert **The South African Law of Evidence** 4th ed (1988) at 236.

⁴¹ Section 203 of the **Criminal Procedure Act** 51 of 1997.

⁴² Section 198 of the **Criminal Procedure Act**.

⁴³ Section 198 of the **Criminal Procedure Act**.

⁴⁴ Section 201 of the **Criminal Procedure Act**.

⁴⁵ Etienne du Toit et al **Commentary on the Criminal Procedure Act** (1993) at 23.39.

⁴⁶ The word 'doctor' is to be interpreted as including professional support persons such as rape counsellors and psychologists.

or to disclose confidential information to the defence counsel before a trial.⁴⁷ Disclosure of such information could be condoned where the patient waived the privilege by request.⁴⁸ Where a doctor refuses to disclose personal information of a client, the defence counsel may subpoena the doctor as a witness, whereupon he or she will have to attend court. Strictly speaking the doctor's duty to testify only arises when he is ordered by the court to reply to the questions put to him or her.⁴⁹

18.4.1.3 Where a doctor, who is not a party to the litigation is required as a witness at a trial to produce a document relevant to the case, that may be achieved by means of a subpoena *duces tecum*. According to Strauss it is not only unethical (Ethical rule 16) for a doctor to disclose medical facts to a third party without authorisation, but it is illegal in that it amounts to an actionable violation of the patient's right to privacy.⁵⁰

18.4.1.4 Medical practitioners who in accordance with their ethical duty protest to the presiding judge for having to testify in breach of their professional secrecy, are accorded sympathetic treatment by judges. But, of course, they are ordered to testify if their testimony is relevant to the case.⁵¹ This means that any document⁵² which contains information about the sexual offence victim and the sexual offence incident is potentially admissible evidence and can be used as such. This allows for the accused or the court to subpoena documents in the possession of the sexual offence victim or a third party (for example a counsellor or psychologist) which may contain information about the victim or the sexual offence.⁵³ Although this defence strategy aimed at discrediting the victim and focussing on what the victim is like instead of the offence committed against him or her has not been documented in South African case law, the trend abroad is toward court-ordered production of medical and other personal records which brings a new and harmful dimension to the experience of victims of sexual offences in the criminal justice system.

18.4.1.5.1 In addition to the obligation on the prosecution to disclose certain documents contained

⁴⁷ See the discussion of the Promotion of Access to Information Act 2 of 2000 below.

⁴⁸ **Korf v Health Professions Council of South Africa** 2000 (1) SA 1171(T) where the information sought was required for the exercise or protection of the applicants rights.

⁴⁹ SA Strauss **Doctor, Patient and the Law** 3rd edition 1991 JL van Schaik (Pty) Ltd at pp 103.

⁵⁰ J Neethling **Die Reg op Privaatheid** (1976) 203, 253, 321.

⁵¹ *Ibid.*

⁵² **Secombe and Others v Attorney General and Others** 1919 TPD 270 at 277 states that 'the word 'document' is a very wide term and includes everything that contains the written or pictorial proof of something.

⁵³ Section 179 of the **Criminal Procedure Act**.

in the docket,⁵⁴ the Promotion of Access to Information Act 2 of 2000 (Assented to on 2 February 2000) has recently been promulgated to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights. This Act may be invoked prior to the commencement of the trial, where the information sought by the defence is not contained in the docket and is not subject to prosecutorial disclosure.

18.4.1.5.2 The Act defines 'personal information' as information about an identifiable individual which includes but is not limited to -

- (a) information about an identifiable individual regarding information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
- (b) information relating to the education or the medical history of the individual;
- (c) any identifying number, symbol or other particular assigned to the individual;
- (d) the address, fingerprints or blood type of the individual;
- (e) the personal opinions, views or preferences of the individual. . .
- (f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the individual;
- (h)
- (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual."

18.4.1.5.3 The Act is applicable to natural and juristic persons, and to private and public bodies. Grounds⁵⁵ for refusal of access to records include the mandatory protection of the privacy of a third party. Both public and private bodies are obliged to refuse a request for access to a record held by the body if its disclosure would involve the unreasonable disclosure of personal information about a third party. Provision is made for disclosure on condition that the individual concerned may consent to disclosure. The Act also provides for the mandatory protection of certain confidential information, and protection of certain other confidential information, of a third party, for instance, if disclosure would constitute an action for breach of a duty of confidence owed to a third party of an agreement.⁵⁶ Section 38 provides for the mandatory protection of safety of individuals and protection of property where, for example,

⁵⁴ In compliance with the **Shabalala** judgement discussed above.

⁵⁵ Section 34 and section 63.

⁵⁶ Section 37(1)(a) and section 65.

disclosure could reasonably be expected to endanger the life or physical safety of the individual. Where an application for access to information is being considered, notice will have to be given to the third party informing him or her that a request for access to a record is under consideration, by whom the application has been made and that the third party may make written or oral representations why the request should be refused or give written consent for the disclosure of the record.⁵⁷

18.4.1.5.4. Section 39 of this Act is of importance as it provides for the mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings. Where a prosecutor has denied an accused access to information contained in the docket in terms of section 60(14) of the **Criminal Procedure Act**, the accused will not be able to invoke this Act to access the information. Information is also protected from disclosure where there is a risk that the identity of an informer may be disclosed, state secrets may be revealed, state witnesses may be intimidated, the proper ends of justice may be impeded, or where the record contains methods, techniques, procedures or guidelines regarding policing or prosecution of alleged offenders.

18.4.1.5.5 The Act also provides that where criminal or civil proceedings have commenced or where the production of or access to a record for the purpose of criminal or civil proceedings are provided for in any other law, this Act may not be invoked to access information.⁵⁸

18.4.2 Comparative analysis

18.4.2.1 Canada

18.4.2.1.1 The **Stinchcombe**⁵⁹ decision extended mandatory disclosure of evidence to the accused in criminal cases. Thereafter Canadian courts were increasingly being asked to disregard privilege⁶⁰ between doctor and patient when the patient reported a sexual offence, although the rules of evidence generally categorise medical and therapeutic records or testimony as hearsay.

18.4.2.1.2 When personal records were not within the Crown's control, defence lawyers tried to get pre-trial subpoenas to gain access to information about a victim's health which had the potential not only to discredit the victim as a complainant, but also to focus attention on him or her as the witness, and away from the accused. The result was that the trial focussed more on the victim's behaviour, rather than

⁵⁷ Section 47 and section 71.

⁵⁸ Section 7.

⁵⁹ **R v Stinchcombe** [1991] 3 S.C.R.

⁶⁰ As stated in <http://www.cma.ca/cmaj/vol-153issue-10/1502.htm> on 00/10/12 the documents are private unless a court orders them disclosed.

on whether the accused violated him or her.⁶¹ The Supreme Court of Canada heard definitive appeals in the **O'Connor**⁶² and **Beharriell**⁶³ cases relating to this form of disclosure of personal records. Toronto lawyer Marilou McPhedran states that these two cases significantly reduce or destroy the privacy rights of complainants.⁶⁴ The **O'Connor** case introduced a general two-step process for determining when a court should allow defence counsel to obtain the therapeutic and personal records⁶⁵ of complainants, thereby curtailing the right to patient confidentiality. In a response to these decisions some physicians started altering aspects of their relationship with patients, including the way they maintain records.⁶⁶

18.4.2.1.3 In an attempt to redress the imbalance between the accused's right to a fair trial and more specifically the right to full answer and defence⁶⁷ and the complainant's right to privacy, equality without discrimination and freedom and security of person, the Canadian Parliament enacted legislation which modified the court directives in the **O'Connor** and **Beharriell** cases.

18.4.2.1.4 In 1997, legislation was passed in Canada to deal specifically with the production of personal records of the complainant or other witnesses.⁶⁸ These provisions require a person accused of a sexual offence seeking production of a record containing information about the complainant to bring an application before court setting out specific grounds showing that the record contains information that is relevant to the accused's defence. The trial judge determines whether the record should be produced, firstly to the judge for review, and secondly, after that review, to the accused. In determining whether and to what extent the record should be produced, the judge is required to consider the rights of the accused under the Canadian Charter of Rights and Freedoms and other specific factors set out in the legislation.

18.4.2.1.5 Sections 278.1 to 278.9 of the Canadian Criminal Code -

⁶¹ [Http://www.cma.ca/cmaj/vol-153issue-10/1502.htm](http://www.cma.ca/cmaj/vol-153issue-10/1502.htm) at pp4 on 00/10/12.

⁶² **R v O'Connor** [1995] 4 S.C.R.

⁶³ **A.(L.L.) v B.(A.)** [1995] 4. S.C.R.

⁶⁴ [Http://www.cma.ca/cmaj/vol-154/1760.htm](http://www.cma.ca/cmaj/vol-154/1760.htm) at pp2 on 00/10/12.

⁶⁵ The courts held that the production of private records is not limited to medical and therapeutic records of complainants in sexual assault cases. It extends generally to any record, in the hands of a third party, in which a reasonable expectation of privacy lies. These records may include medical or therapeutic records, school records, private diaries, social worker activity logs and so on.

⁶⁶ [Http://www.cma.ca/cmaj/vol-154/1760.htm](http://www.cma.ca/cmaj/vol-154/1760.htm) at 2 on 00/10/12.

⁶⁷ The equivalent of the right to adduce and challenge evidence contained in Section 35 of the Constitution of the Republic of South Africa.

⁶⁸ Sections 278.1 to 278.9 of the Canadian Criminal Code.

- Provide that, in sexual offence proceedings, records or any part of a record shall not be produced to the accused unless the trial judge so determines, based on a two-stage application.⁶⁹
- Define 'records' broadly to include any form of record where there is a reasonable expectation of privacy and certain examples are specifically listed.⁷⁰
- Provide that at the initial stage, the accused must establish:⁷¹
 - that the records exist and are held by a named record holder;
 - that the records contain information which is likely to be relevant to an issue at trial or to the competence of a witness to testify; and
 - the specific grounds upon which the accused relies to establish that the information is likely to be relevant.
- Provide that assertions by the accused will not be sufficient to satisfy the requirement that the accused set out the grounds relied upon to establish the 'likely relevance' of the records. This provision makes it clear that speculation about why a record might or may be relevant will not provide the grounds for the application. An 'assertion' is simply a statement not supported by other information. An accused must offer a realistic explanation why the records sought will be likely relevant to an issue at trial or to the competence of a witness to testify.
- Specifically state that any or more of the following assertions are not sufficient to establish that the record is likely relevant:⁷²
 - that the record exists;
 - that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
 - that the record relates to the incident that is the subject-matter of the proceedings;
 - that the record may disclose a prior inconsistent statement of the complainant or witness;
 - that the record may relate to the credibility of the complainant or witness;
 - that the record may relate to the reliability of the testimony of the complainant or witness

⁶⁹ Section 278.1.

⁷⁰ Section 278.3(3).

⁷¹ Section 278.3(4).

⁷² These are not impermissible grounds for production of records *per se*. Where the accused satisfies the trial judge that the records, for example, will contain an inconsistent statement that is likely relevant to issue at trial, the judge would not be prevented from reviewing the records.

- merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
- that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
 - that the record relates to the sexual activity of the complainant with any person, including the accused;
 - that the record relates to the presence or absence of a recent complaint;
 - that the record relates to the complainant's sexual reputation; or
 - that the record was made close in time to a complaint or to the activity that forms the subject matter of the charge against the accused.
- Provide that in determining whether to order production of the record, or any part of the record, to the trial judge for review, the trial judge shall first:⁷³
 - consider the effects of ordering production of the records to the accused, having regard to the accused's ability to make full answer and defence, and the complainant's rights to privacy and equality; and
 - consider the following factors:
 - the extent to which the record is necessary for the accused to make full answer and defence;
 - the probative value of the record in question;
 - the nature and extent of the reasonable expectation to privacy vested in that record;
 - whether production of the record is based on discriminatory belief or bias;
 - the potential prejudice to the dignity, privacy or security of any person to whom the record relates;
 - society's interest in encouraging the reporting of sexual offences;
 - society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
 - the effect of the determination on the integrity of the trial process.

18.4.2.2 **Victoria: Australia**

18.4.2.2.1 In 1998 the Australian state of Victoria introduced legislation, the Evidence (Confidential

⁷³ Sections 278.6 and 278.7.

Communications) Act,⁷⁴ in terms of which confidential communications between the victim or alleged victim of a sexual offence and a medical practitioner or counsellor is protected from disclosure in legal proceedings. The Act enables a court to order disclosure but specifies matters about which the court must be satisfied before doing so.

18.4.2.2.2 The Act defines confidential communication as “a communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after acts constituting the offence occurred or are alleged to have occurred”. The word ‘counsellor’ covers a broad category of persons and is defined as “a person who is treating a person for an emotional or psychological condition”.

18.4.2.2.3 The Act also extends protection to information regarding a person’s identity, specifically information which is about or enables a person to ascertain the address (including a private, business or official address), or telephone number (including a private, business or official telephone number) of the person.

18.4.2.2.4 In terms of section 32D of this Act the court does have a discretion to admit protected evidence if it is satisfied on a balance of probabilities that:

- the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce it, have substantial probative value to a fact in issue; and
- other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available; and
- the public interest in preserving the confidentiality of confidential communications and protecting a protected confider from harm⁷⁵ is substantially outweighed by the public interest in admitting, into evidence, evidence of substantial probative value.

18.4.2.2.5 Section 32 E of this Act limits the privilege not to adduce evidence in that, *inter alia*, consent to disclose the information may be given by the person who made the confidential communication, and that information acquired by a registered medical practitioner by physical examination (including communications made during the examination) in relation to the commission or alleged commission of the sexual offence or a communication made, or the contents of a document prepared, for the purpose of a legal proceeding arising from the commission or alleged commission of

⁷⁴ Act No. 21/1998.

⁷⁵ The Act defines harm as including “actual physical bodily harm, financial loss, stress, shock, damage to reputation and emotional or psychological harm (such as shame, humiliation or fear).

the sexual offence may be adduced.

18.4.3 Evaluation

18.4.3.1 Many victims of sexual offences seek assistance, support and advice. This assistance is sought from a variety of people, including rape counsellors, traditional healers, religious leaders, psychologists and psychiatrists. During the counselling process the victim may speak about intensely private and intimate experiences (the sexual offence as well as other traumatic experiences triggered by the experience), or may express doubts about reporting the deed or pursuing the case if it has been reported. The expression of doubt may occur due to the victim feeling afraid, humiliated or due to the fact that he or she may be in the process of recovering from the trauma and does not wish to relive the event.

18.4.3.2 However, in the hands of the accused or his or her representative, statements about, for example, a reluctance to report the offence, may be given a different interpretation - one that is highly damaging to the victim's credibility. If victims of sexual offences know that their private thoughts, expressed to a professional therapist, counsellor or healer in a supportive environment, are going to become a matter for open debate in a public court of law, they may be deterred from reporting the offence to the police and may be discouraged from seeking the support they may need.

18.4.3.3 A further disadvantage of mandatory production of personal records is that the work of those who provide services and assistance to victims of sexual offences may be detrimentally affected. Service providers may avoid asking victims certain questions or may avoid certain therapeutic processes, which may be of great use to the victim, for fear of the information being manipulated and used against the victim at trial. If a victim fears that his or her confidences may be revealed in court, he or she might also choose not to form particular, valued relationships or will fail to communicate information necessary to the fostering of these relationships.

18.4.3.4 It could also be argued that disclosure of communications between a doctor or counsellor and patient infringes or negates the victim's constitutional right to privacy.⁷⁶ On the other hand the fact that a criminal case can lead to civil action with demands for punitive action from the accused must not be lost sight of. Victim-impact statements, in which factual evidence is not corroborated, can deprive the accused of a major element of his or her defence. Sim states that he is aware of a case where the victim-impact statement had already influenced the court, but the hospital records showed that

⁷⁶ Section 14(d) of the Constitution.

the statement was a gross distortion of what had happened.⁷⁷

18.4.3.5 There are numerous arguments in favour of allowing the accused access to personal records, which in effect breaches the confidentiality of counsellor and sexual offence victim communications in criminal trials. For example, the communications may be relevant in order for truth to prevail and the accused has a right to adduce and challenge evidence.

18.4.3.6 It is clear from the above that compelling arguments could be made for either position and that legitimate protection of rights are being sought.

18.4.3.7 The Commission is not of the opinion that a blanket privilege should be attached to personal records as certain records may be relevant to discovering the truth of the case at hand. However, the Commission is also not of the opinion that the defence should be allowed to go on a fishing expedition, subpoenaing all personal records relating to the person in question.

18.4.3.8 In the unlikely event of personal records which are not pertinent to the incident forming part of the docket, the Policy Directives of the NDPP⁷⁸ will govern the disclosure of these records. Provisions relating to the access of records contained in the Promotion of Access to Information Act may only be invoked before the commencement of proceedings.⁷⁹ The opinion is held that if the defence should request the disclosure of records at this point in time they would in all likelihood be embarking on a fishing expedition. The person⁸⁰ from whom the records are sought is obliged to notify the affected person about the application. For various reasons the affected person and the record keeper may object or refuse to disclose the information contained in the records. The professional obligation of doctors, counsellors and other persons in this category of support persons to obtain a patient's consent to speak to the prosecution or the defence, still applies. Additionally, the presiding officer would not be in a position, before the beginning of the trial, to determine the relevance, much less the admissibility, of the records sought, or to balance effectively the constitutional rights affected by an order for production.

18.4.3.9 Before a court will order a witness to disclose evidence which he or she has obtained in confidence, the presiding officer will need to determine the relevance of such evidence. A trial within a trial will then ensue - the result of which will be an order for the witness to disclose the requested evidence or not. **The Commission is satisfied that the rights of the complainant and the accused**

⁷⁷ Sim M **Compensation claims: insurance, legal and medical aspects**. Victoria (BC): Emmess Publications 1992 as quoted at <http://www.cma.ca/cmaj/vol-155/issue-7/0859e.htm> on 00/10/12.

⁷⁸ Discussed above.

⁷⁹ See section 7 of the Act.

⁸⁰ The record keeper is generally considered to be the owner of the record.

would be adequately protected by this procedure in that a witness will only be ordered by court to disclose personal information relating to a third person (in this case the complainant) if the court deems such evidence to be relevant to the case at hand.

18.4.3.10 However, the Commission takes note of developments in international jurisprudence and deems it prudent to make a recommendation in the alternate providing for a more formalised approach to be followed in order to access personal records. The recommendation is exposted below.

18.4.3.11 In an attempt to acknowledge the confidentiality of personal records relating to a victim of a sexual offence and the right to a fair trial of the accused, the Commission recommends that the disclosure of personal records should be addressed in sexual offence legislation. It suggests that a two stage approach be followed. The defence should have to demonstrate that the information contained in the records is likely to be relevant either to an issue in the proceedings or to the competence of the subject of the records to testify - based on evidence and not on speculative assertions or on discriminatory or stereotypical reasoning. If the court is satisfied that the information is likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, if the accused can show that the salutary effects of producing the documents to the court for inspection outweigh the deleterious effects of such production, the judge should so order. Then, after examining the records, the judge should balance the conflicting constitutional rights to determine whether and to what extent production to the defence should be ordered.

18.4.3.12 The Commission further recommends that identifying information, for example contact details and personal particulars not relevant to the case, should not be disclosed. The Commission is of the opinion that consent to disclosure of personal records by the person who made the confidential communication be acknowledged, and that information acquired by a registered medical practitioner by physical examination (including communications made during the examination) in relation to the commission or alleged commission of the sexual offence or a communication made, or the contents of a document prepared, may be adduced for the purpose of a legal proceeding arising from the commission or alleged commission of the sexual offence.

18.4.3.13 The following legislative enactments are recommended:

(1) Subject to the provisions of subsections (3) and (5), no personal record may be adduced as evidence in criminal proceedings involving the alleged commission of a sexual offence.

(2) For purposes of subsection (1) a personal record refers to a record of communications, written or oral, made by a person against whom a sexual offence was alleged to have been committed in confidence to a registered medical practitioner or registered counsellor and includes a record that existed prior to the alleged commission of a sexual offence against that person.

(3) A court may, upon application by any interested party, order disclosure of a personal record in full or in part in any manner that the court deems fit after it has considered any potential prejudice to the dignity, privacy and security of the person to whom the record relates, including the nature and extent of any harm that would be caused to such person and if it is satisfied that -

- (a) the evidence contained in such record will, on its own or in conjunction with any other evidence, have substantial probative value to a fact in issue;
- (b) no other evidence that has similar probative value to the fact in issue is available; and
- (c) the public interest outweighs the protection of the dignity, privacy and security of such person.

(4) The application referred to in subsection (3) must satisfy the court that -

- (a) a personal record exists and is held by an identified record holder;
- (b) such record contains information which is likely to be relevant to a fact in issue at the proceedings pending before the court or to the competence of a witness to give evidence;
- (c) the grounds upon which the party making the application relies to establish that the contents of such record is likely to be relevant are sufficient to warrant consideration of disclosure; and
- (d) granting the application will be in the interests of justice and in the interests of the person to whom such record relates.

(5) A court may, notwithstanding the provisions of subsection (3), order disclosure of a personal record if the person to whom the record relates consents to such disclosure or if a personal record has been prepared for purposes of any legal proceedings arising from the commission or alleged commission of a sexual offence.

(6) A court shall, upon receipt of a personal record after its disclosure, consider the contents of such record prior to granting access to that record to any party and may, upon furnishing reasons, grant or refuse access to that record.

18.4.3.14 Comments on the feasibility of both options is welcomed.

CHAPTER 19**FURTHER PARTICULARS****19.1 Introduction**

19.1. The accused is entitled to request such further particulars as are necessary to enable him or her to plead to the charge. The purpose is to adequately inform the accused of the State's case against him or her.¹ The particulars supplied must have a bearing upon the evidence which the State intends to call.

19.2. Current Law

19.2.1. Section 84(1) of the **Criminal Procedure Act** 51 of 1977 makes it peremptory that a charge shall set forth the relevant offence in such a manner and with such particulars as may be reasonably sufficient to inform the accused of the nature of the charge. It is not sufficient to merely name the offence; all the elements of the offence should be spelled out as well.²

19.2.2 The provision of further particulars is governed by a number of sections in the **Criminal Procedure Act**. Sections 85 and 87 of the **Criminal Procedure Act** 51 of 1977. Section 85(1)(d) provides that an accused may, before pleading to a charge, object to the charge on the ground that the charge does not disclose sufficient particulars of any matter alleged in the charge.³ Section 85 (2) provides that the court, if it decides that an objection in terms of paragraph (1) of section 85 is well founded, may make such an order relating to the amendment of the charge or the delivery of the particulars as it deems fit. Subsection 2(b) of section 85 empowers the court to quash a charge when the prosecution fails to comply with an order relating to the amendment of the charge or the delivery of further particulars.

19.2.3 Section 85 is an effective tool for the accused as it enables an accused to obtain,

1 Section 87 of the **Criminal Procedure Act** 51 of 1977.

2 N Steytler **Constitutional Criminal Procedure**: Durban Butterworths 1998 at 227.

3 Provided that such an objection may not be raised to a charge when an accused is required to plead to a charge in the Magistrate's Court in terms of section 119 and 122A.

by means of a court order, further particulars that the prosecution does not necessarily wish to make available.⁴

19.2.4 Section 87 provides that an accused may at any stage before any evidence has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in the charge. Further, the court before which the charge is pending may at any time before any evidence in respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge. The court may, if necessary, adjourn the proceedings in order that such particulars may be delivered.

19.2.5 A proviso to section 87 excludes proceedings where an accused is required in terms of section 119 and 122A to plead to a charge in the Magistrate's Court.⁵

19.2.6 Both sections 85 and 87 have to do with the provision of further particulars to enable the accused to prepare his defence adequately. The distinction between the two sections is that section 85 only allows for an objection to be made to a charge before a plea is entered, the court may in terms of section 87 order that the particulars be delivered any time before evidence has been led.⁶

19.2.7. In order to deal with the possible problems a child witness may have in recounting numerous dates and times of multiple offences committed against them (and thus providing further particulars, the South African prosecuting authority relies on section 94 of the **Criminal Procedure Act**⁷ which provides that:

‘where it is alleged that an accused on divers occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on divers occasions during a stated period’.

19.2.8. However, if the defence requests further particulars and the prosecution is

4 Du Toit et al **Commentary on the Criminal Procedure Act** at 14-17.

5 These sections are not relevant to the current issue and therefore not elaborated on.

6 Du Toit, de Jager, Paizes, Skeen and van der Merwe **Commentary on the Criminal Procedure Act** Juta, Cape Town 1993 Third reprint at 14-17.

7 Act 51 of 1977.

unable to provide them, the court may dismiss the case against the accused’.

19.2.9 Section 92(2) of the **Criminal Procedure Act** provides that a charge shall not be defective “if any particular day or period is alleged in any charge to be the day on which or the period during which any act or offence was committed, proof that such an act or offence was committed on any other day or during any other period not more than three months before or after the day or period alleged therein shall be taken to support the allegation in the charge sheet. Provided further that time is not of the essence to the charge. If, however, it appears to the court that the accused is likely to be prejudiced thereby in his or her defence on the merits, the court may reject such evidence and the accused will be deemed not to have pleaded to the charge”.

19.2.10 Section 93 of the **Criminal Procedure Act** caters for the situation where the accused’s defence is an alibi by providing that if the court, which is hearing the matter, is of the opinion that the accused is prejudiced in making such defence if proof is admitted that the act or offence in question was committed on an day or a time other than the day or time stated in the charge, the court shall reject such proof notwithstanding that the day or time in question is within a period of three months before or after the day or time stated in the charge.

19.2.11 An objection to a charge would be well-founded where the indictment, as supplemented by further particulars and the summary of substantial facts, is insufficient and does not enable the accused to know exactly what the case against him or her encompasses.⁸ The State is bound by the further particulars that are provided.

19.2.12 However, since the decision of the Constitutional Court in case of **Shabalala v The Attorney-General of the Transvaal & Another**⁹ requests for further particulars are few and far between as the State usually makes Section A of the docket available and that is taken to constitute further particulars. In the case of **Shabalala** the Constitutional Court held, *inter alia*, that a blanket privilege on the docket was unconstitutional and that the accused should be entitled to those documents in the docket that he or she require for the purpose of enabling the accused to properly exercise his or her rights to a fair trial in terms of section 25(3) of the Constitution.¹⁰

8 **S v Ismail & others** 1993 (1) SACR 33 (D).

9 1996 (1) SA 725 (CC).

10 See Chapter 20 for a full discussion on the **Shabalala** decision.

19.3 **Submissions received**

19.3.1 This issue was not raised in Issue Paper 10 and no submissions were received by the Commission.

19.4. **Evaluation**

The Commission is of the opinion that there are no problems with the current provisions and makes no recommendation in this regard.

CHAPTER 20**THE VULNERABLE WITNESS¹****20.1 Introduction**

20.1.1 In this chapter we deal with the manner in which the victim or state witness is treated in court and whether or not it is necessary to create a special category of witness to whom automatic protective measures should apply. In the following chapters we will focus on problematic issues specifically relating to sexual offences which impact on the manner in which the State conducts or should conduct its case.

20.2 The current position regarding the victim as a witness

20.2.1 For many victims, their first exposure to crime is also their first exposure to the criminal justice system. It is an experience, on top of the original trauma of the crime, that can be bewildering and sometimes even frightening, especially when the crime has been of a sexual nature. Where a person is also vulnerable as a result of characteristics such as his or her race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or lack of financial status; or as a result of surrounding circumstances, such as becoming a victim of crime, the possibility of being re-victimised by the very system which is supposed to uphold his or her rights is increased.

20.2.2 The term 're-victimisation' has been coined to describe the experience where victims are subjected to further victimisation by the very state organs to whom they turn for assistance. In other words the victim is victimised twice, first by the offender and then by the criminal justice system.

20.2.3 The criminal justice system puts victims who are expected to testify through an ordeal. The re-victimisation of some victims consists of being subjected to multiple interviews with different departmental officials. Others are literally left in the dark until minutes before the trial commences. Some victims are subjected to insensitive remarks, questions and glances by officials in the criminal justice system. Furthermore, courtroom procedures are not always

¹ Australia uses the phrase "special witness".

conducive to allowing such witnesses the opportunity to give a full and coherent account of the facts. Rather, it may cause further and unnecessary distress and trauma. Victims of sexual offences are not treated any differently from other witnesses. They are accorded no special recognition. Invariably the witness leaves the justice process disillusioned and less inclined to come forward again should the need arise.

20.2.4 The vulnerability of witnesses and especially the vulnerability of children have led to a variety of changes in court practices and procedures that are aimed at making it easier for them to give evidence. These measures include excluding the public from the trial,² the use of closed circuit television (CCTV) or screens and the appointment of an intermediary,³ to name a few. Some measures, such as acquainting witnesses before a trial with the appearance of the courtroom, the way in which a trial is conducted and using furniture of appropriate size for child witnesses, do not require legislation and raise no issues of principle. Other measures are more controversial and would require legislation or the amendment of legislation if they are to be adopted.⁴ The measures referred to here and other related measures will be dealt with in detail in subsequent chapters.

20.2.5 Of importance to this discussion is that presently South African law does not identify any witness or category of witnesses as belonging to a special category which deserves automatic protection or measures to be employed as a result of the vulnerability of a person finding themselves in such a category. Simply stated, the vulnerability of a victim of a sexual offence is not recognised and as such he or she is not automatically afforded the opportunity to access measures that would make giving evidence easier.

20.3 Comparative analysis

20.3.1 United Kingdom

20.3.1.1 The United Kingdom Home Office Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System⁵ proposed a

² Section 153 of the **Criminal Procedure Act, 1977**.

³ Section 170 A of the **Criminal Procedure Act, 1977**.

⁴ Issue Paper 10 at pp 58 and further.

⁵ Home Office **Speaking up for Justice** June 1998.

scheme whereby a vulnerable or intimidated witness and his or her needs are identified at an early stage of the criminal justice process with the aim of assisting him or her in giving the best evidence possible, accompanied by the least possible trauma by doing so. According to the Working Group victims may, by virtue of personal characteristics or circumstances, fall into one of two categories of vulnerable witness.⁶ Each category results in specific mechanisms being activated to assist the witness. The Working Group proposed that any witnesses⁷ (excluding the defendant) who are vulnerable as a result of **personal characteristics** which may relate to the effects of a disability or illness, should **automatically** attract the provision of special measure(s). The particular measure(s) ordered would depend upon the circumstances of a particular case. Those witnesses (excluding the defendant) whose vulnerabilities depend upon **circumstances** should be able to receive assistance by means of special measures at the **discretion** of the court.

⁶ The categories of vulnerable witness are defined as follows:

Category (a): The court should be required to make available one or more of a range of measures, (which would be listed in the legislation): -

if the witness by reason of significant impairment of intelligence and social functioning/ mental disability or other mental or physical disorder, or physical disability, or if the witness requires the assistance of one or more special measures to enable them to give best evidence;

Category (b): The court should have discretion to make available one or more of a range of measures (which would be listed in legislation) if the court is satisfied that the person:

- a. would be likely to suffer such emotional trauma, or
- b. would be likely to be so intimidated or distressed as to be unable to give best evidence without the assistance of one or more of the measures available/listed in the legislation.

In reaching a decision the court would be required to take into account:

- (1) a person's age, culture/ethnic background, or relationship to any party to the proceedings;
- (2) the nature of the offence: or
- (3) the dangerousness of the defendant or his or her family or associates in relation to the witness;
- (4) any other relevant factor.

⁷ Their recommendation is applicable to all witnesses, not just those involved in a sexual offence matter.

20.3.1.2 The Working Group also specifically proposed that a victim who is a witness for the prosecution for offences of rape and other serious sexual offences should have special measures made available to him or her and that there should be a rebuttable presumption that such special measures should apply. The Working Group also noted that it may transpire that despite the adult victim's level of vulnerability, he or she would prefer not to make use of special measures. With regards to child witnesses, the Working Group recommended an automatic attraction of the new special measures proposed in the report including, videoed pre-trial cross examination and an intermediary to assist with communication. The Working Group also suggested that child witnesses give live evidence to the court via CCTV links.

20.3.1.3 Some of the special measures proposed by the Working Group to assist all vulnerable witnesses are:

- Live CCTV links to enable witnesses to give evidence from a separate room or location;
- Video recorded interviews of witnesses as evidence in chief;
- Videoed pre-trial cross examination for use in appropriate cases where the witness has had his or her statement recorded on video and could particularly benefit from cross-examination outside the court room. Once this has taken place, there should be no further cross-examination unless new material comes to light;
- provision of an escort for the witness to and from the court;
- a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault.⁸

20.3.1.4 The recommendations made by the Working Group culminated in the enactment of the **Youth Justice and Criminal Evidence Act 1999**. The Act acknowledges and defines a category of vulnerable witness and contains a range of measures designed to help young, disabled, vulnerable or intimidated witnesses to give their best evidence in criminal proceedings. Of note is the fact that the accused (defendant) is excluded from the category of witnesses to whom the protective measures may apply by reason that the law provides adequate safeguards in the proceedings for the accused as a whole to ensure a fair trial.

20.3.1.5 Chapter 1 of Part II of the **Youth Justice and Criminal Evidence Act 1999**

⁸ These and other measures will be discussed in detail in subsequent chapters.

makes provision for special measures in case of vulnerable and intimidated witnesses. Section 16 of this Act specifically provides for a category of witnesses who are eligible for assistance on grounds of age or incapacity. Section 16 reads as follows:

- 16(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section -
- (a) if under the age of 17 at the time of the hearing; or
 - (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).
- (2) The circumstances falling within this subsection are-
- (a) that the witness -
 - (i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
 - (b) that the witness has a physical disability or is suffering from a physical disorder.
- (3) In subsection (1)(a) “the time of the hearing”, in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.
- (4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.
- (5) In this Chapter references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

20.3.1.6 Section 17 specifically provides for a category of witnesses who are eligible for assistance on grounds of fear or distress about testifying. Section 17 reads as follows:

- 17(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.
- (2) In determining whether a witness falls within subsection (1) the court must take into account, in particular -
- (a) the nature and alleged circumstances of the offence to which the proceedings relate;
 - (b) the age of the witness;
 - (c) such of the following matters as appear to the court to be relevant, namely-
 - (i) the social and cultural background and ethnic origins of the witness,

- (ii) the domestic and employment circumstances of the witness, and
 - (iii) any religious beliefs or political opinions of the witness;
- (d) any behaviour towards the witness on the part of -
- (i) the accused,
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.

20.3.1.7 Chapter II of this Act extends specific protection to complainants in sexual offence proceedings. Section 34 and 35⁹ provide that neither the complainant of a sexual offence nor a witness to the sexual offence may be cross-examined by the accused in person. Additionally section 41 places a restriction on evidence or questions about the complainant's sexual history. The provisions in this Act are, subject to certain exclusions, applicable to England, Wales, Scotland and Northern Ireland.

20.3.2 Scotland

20.3.2.1 The Scottish Law Commission recommended¹⁰ that the court should have regard to age, physical and mental condition of the witness, the nature and seriousness of the offence charged, evidence which the witness was to give, the relationship between the witnesses and the accused; the possible effect on the witness if required to give evidence in an open court and the likelihood that the witness may be better able to give evidence if not required to do so in open court.

20.3.2.2 Notwithstanding the above recommendation the **Crime and Punishment (Scotland) Act 1997** adopted an approach which focusses on categories of individuals whose

⁹ These sections were brought into force on the 4th September 2000. See <http://www.hms0.gov.uk?si/si2000/20002091.htm> on 01/01/04.

¹⁰ Scottish Law Commission **Report on the Evidence of Children and Other Potentially Vulnerable Witnesses** Edinburgh: HMSO 1990.

own personal characteristics make them obvious candidates for the possible use of special provisions. Section 29 of this Act, entitled Evidence of Vulnerable Persons: Special Provisions, substitutes section 271¹¹ of the Criminal Procedure (Scotland) Act 1995. It extends the existing child evidence provisions in Scotland to adult vulnerable witnesses over 16 years who are subject to a court order under the Mental Health Acts¹² on the grounds that they are suffering from a mental disorder, in addition to anyone who otherwise appears to the court to suffer from significant impairment of intelligence and social functioning.

20.3.2.3 Section 29 of the **Crime and Punishment (Scotland) Act 1997** defines a vulnerable person as follows:

“Vulnerable person” means -

- (1) any child;¹³ and
- (2) any person of or over the age of 16 years -
 - (i) who is subject to an order made in consequence of a finding of a court in any part of the United Kingdom that he is suffering from a mental disorder within the meaning of section 1(2) of the Mental Health (Scotland) Act 1984, section 1(2) of the Mental Health Act 1983, or Article 3(1) of the Mental Health (Northern Ireland) Order 1986 (application of enactment); or
 - (ii) who is subject to a transfer direction.....; or
 - (iii) who otherwise appears to the court to suffer from significant impairment of intelligence and social functioning.”

20.3.2.4 A witness who is a victim of a sexual crime which is being heard by a Scottish court will not automatically be classified a vulnerable witness unless he or she applies to be considered to be such in terms of section 29 of the **Crime and Punishment (Scotland) Act 1997**. Once the witness is considered to be a vulnerable witness special measures also do not automatically apply - the witness has to apply for the specific measure(s) that he or she requires in order to give evidence.

20.3.3 New Zealand

¹¹ On 01/01/04 this section had not yet been substituted. See http://www.hmso.gov.uk/acts/acts1995/Ukpga_19950046_en_13.htm.

¹² The Mental Health (Scotland) Act 1984, the Mental Health Act 1983, or the Mental Health (Northern Ireland) Order 1986 (application of enactment).

¹³ This section defines a child as being a person under the age of 16 years.

20.3.3.1 In 1996 the New Zealand Law Commission published a paper on **The Evidence of Children and Other Vulnerable Witnesses**.¹⁴ The purpose was to make the evidence of children as complainants and other witnesses as clear, simple and accessible as practicable, and to facilitate the fair, just and speedy resolution of disputes. This was to be done within the criminal procedure framework with the aim of ensuring the fair trial of persons accused of offences, protecting the rights and freedoms of all persons suspected of offences, and providing effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal trials.¹⁵

20.3.3.2 The New Zealand Law Commission arrived at the conclusion that the giving of evidence in alternative ways may assist **all** witnesses in appropriate cases, and will normally result in fuller and more reliable evidence being available to the fact finder. The Commission proposed that in the case of child complainants, directions must be sought from the court on how the child will give evidence. In all other cases, the witness may apply to the court to give evidence in an alternative way, based on the needs of the individual.¹⁶ The Commission decided against a category of vulnerable witnesses as they were of the opinion that there is no reason to think that most, or even many, members of one particular group are in fact vulnerable, or that any person should be regarded as vulnerable simply because they belong to a particular group.¹⁷ Any witness, whether he or she is the complainant or a witness to the offence, may therefore apply for special measures to be implemented so as to facilitate the giving of evidence. The special measures are not directly linked to the person being a vulnerable person or witness.

20.3.3.3 The preliminary paper was followed by a report¹⁸ which was published in 1999. It should be noted that the report has not resulted in any new or revised legislation, although recommendations contained in the report may be considered in the New Zealand Parliament this year.¹⁹

¹⁴ Preliminary Paper 26.

¹⁵ New Zealand Law Commission Preliminary Paper 26 at p v.

¹⁶ New Zealand Preliminary Paper 26 at p vii.

¹⁷ Preliminary paper 26 at pp32.

¹⁸ New Zealand Law Commission Report on Evidence: Report No 44.

¹⁹ Correspondence with New Zealand Law Commission 7 January 2001.

20.3.4 Queensland

20.3.4.1 The **Queensland Evidence Act 1977**, as amended, provides for the “evidence of a special witness” in section 21A(1). A special witness is defined as a child under the age of eight years; or a person who, in the court’s opinion-

- (i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness; or
- (ii) would be more likely to suffer severe emotional trauma; or
- (iii) would be likely to be so intimidated as to be disadvantaged as a witness; if required to give evidence in accordance with the usual rules and practice of the court.

20.3.4.2 The section further provides that the court may of its own motion, or on application, make one or more orders which are essentially protective measures to lessen the trauma and improve the quality of the evidence given by that witness. These protective measures are available to a party to the proceedings, and in criminal trials to the person charged.²⁰

20.3.4.3 This is a significant difference to the United Kingdom legislation which specifically excludes the accused from the category of witnesses that are entitled to protective measures.

20.3.5 Western Australia

20.3.5.1 Section 106 R of the **Western Australia Evidence Act 1906** as amended by the **Western Australia Acts Amendment (Evidence of Children and Others) Act 1992** enables a court to declare a witness a “special witness”, if the witness, “by reason of mental or physical disability” is unlikely to be able to give evidence or to give evidence satisfactorily”, or is likely to suffer severe emotional trauma, “or be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant”.

20.4 Submissions received

²⁰ Section 21A (1A).

20.4.1 The possibility of re-victimisation of victims in the Criminal Justice System is clearly illustrated by the submissions received. This is particularly evident from the submissions of organisations representing victims who are vulnerable as a result of physical characteristics.

DICAG submits that children with disabilities are at a higher risk for abuse because they may be:

- less able to articulate the fact of abuse;
- reluctant to report instances of abuse for fear of losing vital linkage to major care providers; and
- considered less credible than non-disabled children, when and if they report abuse.

20.4.2 **The Deaf Community of Cape Town** submits that deaf children should be given special consideration because of communicating via sign language. It notes that sign language interpreters are needed to intervene in any cases involving abuse of deaf children. They add that the provision of an interpreter will not afford the child access to justice where the level of communication of the child has not been considered. The person acting as interpreter must be able to resort to gestures or home signs, if there are any, before he or she can find out what really happened. They have also found that in most cases children who cannot communicate effectively are abused because they are unable to relate that they have been abused and are often not believed when they do disclose abuse.

20.4.3 **Ms Susan Manson** and **Ms Linzi Fredman**²¹ state that most of their clients function intellectually and adaptively at the age levels of very young children. For this reason they contend that such witnesses should be afforded the same protective measures as children.

20.4.4 The response to the question posed in Issue Paper 10²² as to whether the use of measures to shield the child witness from the accused should be dependent upon the court exercising its discretion to appoint an intermediary, is insightful to the present discussion. The majority of respondents were of the opinion that this should not be the case.²³ Some

²¹ Clinical psychologists, Cape Mental Health.

²² South African Law Commission, Issue Paper 10, Sexual Offences Against Children.

²³ **Association for persons with physical disabilities, Northern Cape; Ms A Bezuidenhout, Social Work Services, SAPS; Ms A Dreyer, H Coertze & I Swart, South African National Council for Child and Family Welfare; Tshwaranang Legal Advocacy Centre.**

respondents were of the opinion that such additional measures should be automatically available to a victim.²⁴

20.4.5 In relation to the assumption that a category of witnesses should automatically be afforded certain protective measures, **Dr René Potgieter**²⁵ refers to recent research done by Dr Amanda Wade at the University of Leeds which shows clearly that children of eight to 18 years have a need and are capable to make their own choice whether they want to testify in court, or make use of another system where they can be shielded from the accused or from open court proceedings. Dr Wade points out that it is of the utmost importance that the child's wish to testify in this way should outweigh all other factors - the accused should not be allowed to request otherwise and magistrates should not have jurisdiction over this. If a child wishes to testify in open court, his or her wish as to who should be present in court should be respected as far as possible. However, the choice of whether the child should testify in open court, or through an intermediary, or the extent to which the child wishes to be shielded from the accused, should be the sole prerogative of the child, as it is the child who is going to testify and is going to have to cope with the stress of testifying and being cross-questioned. **Dr Wade** says that where any doubt exists about the child's wish to testify in open court, or where there is reason to believe that the child was coaxed or coerced into a specific choice, the matter should be assessed by a psychologist or forensic social worker specialising in the field of child sexual abuse, whose recommendation should be final and accepted by court.

20.4.6 The fact that the accused also has the right to have a "say"²⁶ in the matter as to whether "protective measures" are used to shield the witness, is in the opinion of **Ms W.L. Clark**²⁷ "an undesirable state of affairs as ultimately the decision will lie with the magistrate and if he or she is unsympathetic to the child's needs great harm can result".

20.5 Evaluation and recommendations

20.5.1 While recognising that a variety of protective measures are already in existence,

²⁴ **Sr Potter, Agape School for the Cerebral Palsied; Supt N Nilsson, SAPS Youth Desk, Western Cape.**

²⁵ **RP Clinic, Pretoria.**

²⁶ **S v Mathebula** 1996 (2) SACR 231.

²⁷ **Magistrate's Court, Verulam.**

currently the matter is dealt with on an *ad hoc* basis and frequently a witness will not be aware of the fact that they may request a screen or the exclusion of the public from the court.

20.5.2 The Commission believes that it will be in the interests of justice to create a category of vulnerable witness. The Commission aligns itself with the international move towards making special measures automatically available to all victims of sexual offences who are required to give evidence in criminal proceedings. In addition to this category any other witness to a sexual offence may apply for protective measures to be invoked for the benefit of reducing the trauma of testifying.

20.5.3 The benefit of this approach would be that the court will be obliged to consider the matter formally and that those witnesses found to be vulnerable witnesses will be identified at an early stage in the investigation and will have their needs met accordingly. Decisions on the measures to be used would be made binding so as to ensure that the witness knows in advance of the trial what assistance he or she will be receiving, including the way in which he or she will be giving evidence. In addition to the benefit of a witness being able to give his or her best evidence, secondary victimisation that usually occurs during the trial process will be reduced significantly.

20.5.4 In addition to being a witness to a sexual offence, if a witness suffers from a disability or any similar characteristic, the witness clearly needs to be treated in a manner which acknowledges this fact in order to enable him or her to give the best evidence he or she can. Similarly witnesses suffering from impaired mental functioning are also particularly vulnerable as a result of their difficulty in communicating, their inability to recognise what their source of pain is and the fact that they are often in residential care and may be highly dependent on the perpetrator. A number of other factors may contribute to making these witnesses more vulnerable than usual.

20.5.5 It is true that not every child or adult victim or witness of a sexual offence will necessarily be particularly vulnerable if required to give evidence by conventional means. Therefore not every victim or witness of a sexual offence requires special measures. Yet it cannot be denied that victims of a sexual offence are potentially more vulnerable as witnesses than other witnesses due to the very nature of the offence. **In the event that a victim of a sexual offence should not wish to have protective measures relating to the manner in which he or she will give evidence, the Commission deems it prudent to recommend that any**

person older than 10 years of age should have the choice to waive the automatic provision of protective measures.

20.5.6 The Commission has carefully considered whether the accused should be included in a category of vulnerable witnesses thereby making him or her eligible for protective measures. The Commission has found that numerous protective measures are already afforded to an accused. In addition to the constitutionally entrenched rights of arrested, detained and accused persons²⁸ numerous protective measures are to be found in the **Criminal Procedure Act**.²⁹

20.5.7 As a result the Commission concludes that the accused is afforded considerable safeguards in the proceedings as a whole to ensure a fair trial and should not be considered a vulnerable witness.

20.5.8 The Commission recommends that the Sexual Offence Act should provide for a category of vulnerable witness and that such witness should be accorded, in addition to the existing protective measures provided for in the Criminal Procedure Act, the other protective measures recommended in this paper.

20.5.9 The following legislative enactment is recommended:

Vulnerable witnesses

xx Vulnerable witnesses

(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, must declare a witness, other than the accused, who is to give evidence in that proceedings a vulnerable witness if such witness is -

- (a) the complainant in the proceedings pending before the court; or**
- (b) below the age of 18 years and has witnessed the offence being tried.**

²⁸ Section 35 of the Constitution of the Republic of South Africa, 1996.

²⁹ See *inter alia* sections 74 and 153(4) of the **Criminal Procedure Act** and the South African Law Commission Report on Juvenile Justice in respect of accused persons under the age of 18 years.

(2) The court may, on its own initiative or on application by the prosecution or any witness who is to give evidence in proceedings referred to in subsection (1), and if that witness is below the age of 18 years, on application by that witness, if at least ten years of age, or his or her parent, guardian or a person *in loco parentis*, declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

- (a) age;
- (b) intellectual impairment;
- (c) trauma;
- (d) cultural differences; or
- (e) the possibility of intimidation.

(3) The court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon any knowledgeable person to appear before and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

- (a) allowing that witness to be accompanied by a support person as provided for in section 14;
- (b) allowing that witness to give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977;
- (c) directing that the witness must give evidence through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977;
- (d) directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act, 1977;
- (e) prohibiting the publication of the identity of the complainant as provided for in section 154 of the Criminal Procedure Act, 1977, or of the complainant's family; or
- (f) any other measure which the court deems just and appropriate.

(5) If the court has declared a person below the age of 18 years a vulnerable witness, the court must, subject to the provisions of subsection (8), direct that an intermediary

as referred to in subsection (4)(c) be appointed in respect of such witness unless there are exceptional circumstances justifying the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.

(6) The court may direct that the protective measures referred to in paragraphs (b) to (e) of subsection (4) must be applied in respect of a vulnerable witness, irrespective of any other qualifying criteria that may be prescribed by the provisions of the Criminal Procedure Act, 1977, referred to in those paragraphs.

(7) In determining which of the protective measure or protective measures as referred to in subsection (4) should be applied to a witness, the court must be satisfied that such measure or measures is or are likely to improve the quality of evidence to be given by that witness, and must have regard to all the circumstances of the case, including -

- (a) any views expressed by the witness, if ten years of age or older;
- (b) views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the witness's dignity and sense of safety and to protect the witness from further traumatising; and
- (d) the question whether the protective measure or protective measures is or are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(8) The court may at any time revoke or vary a direction given in terms of subsection (4) upon the request of the prosecution or the witness concerned: Provided that where a witness is below the age of 18 years, such revocation or variation may only be effected upon the request of that witness or his or her parent, guardian or a person *in loco parentis* and if that witness is at least ten years of age.

CHAPTER 21

LEGISLATING FOR PROCEDURAL REFORM: PROTECTIVE MEASURES, RULES OF EVIDENCE AND OTHER PROCEDURAL ISSUES

21.1 Introduction

21.1.1 As already indicated in this Discussion Paper, the Commission is of the opinion that it is justifiable to make specific provision for protective measures for witnesses in sexual offence trials due to the traumatising and intimate nature of the offences. Given the existing protective measures presently contained in the **Criminal Procedure Act 51 of 1977** the question arises as to where these existing (and new protective measures) should be located.

21.1.2 In this regard, the following options are presented for consideration:

21.2 Option One

The first option is to consolidate all sexual offence legislation in one new Act. This will involve incorporating into the proposed new sexual offence legislation the revised substantive law, the category of 'vulnerable witness', new rules of evidence applicable in sexual offence trials and, in a schedule, the amendments to the current protective measures contained in the **Criminal Procedure Act**. Such consolidated sexual offence legislation would include both the substantive and procedural law on sexual offences.

21.2.1 The advantage of this option is that it will make the law more accessible as all the provisions relating to sexual offences will be contained in a single document rather than being found in a number of pieces of legislation.

21.2.2 The disadvantage of this option is the duplication of legislation where the rules of evidence and procedure overlap. The amendments would have to be cross-referred where necessary, in order to make sense of the amended provisions, and provisions already in the **Criminal Procedure Act** will have to be duplicated in the new sexual offence legislation.

21.3 **Option Two**

21.3.1 The second option is to include in the new sexual offences Act the substantive law and only the new proposed protective, procedural or evidentiary provisions and list in a schedule the amended portions of the **Criminal Procedure Act**. The existing protective measures in the **Criminal Procedure Act** would be amended and remain in that Act. It must be borne in mind that the **Criminal Procedure Act** is applicable to all criminal trials and is consequently general in nature. However, the distinguishing nature of certain offences is recognised in the **Criminal Procedure Act** as special provision is made for certain offences. A particularly good example is section 153(3A) which creates separate rules for *in camera* hearings in cases involving offences of an indecent nature or extortion.

21.3.2 The advantage of this proposal is that it will create a scenario where both the substantive law and new procedural law will be contained in a single piece of legislation and the existing provisions in the **Criminal Procedure Act** amended within the context of remaining unamended provisions.

21.3.3 The disadvantage is that not all the provisions dealing with sexual offences will be located in one easily accessible piece of legislation. Some will be located in the sexual offence legislation and some in the **Criminal Procedure Act**.

21.4 **Option Three**

21.4.1 The third option is to include in the new sexual offence legislation only the substantive law and to insert all the proposed procedural reforms in the **Criminal Procedure Act**.

21.5 **Recommendation**

The Commission favours option two and recommends including in the new sexual offences Act the new substantive law, the category of 'vulnerable witness', new rules of evidence applicable in sexual offence trials and, in a schedule, the amendments

to the current protective measures contained in the **Criminal Procedure Act**.

21.6 **Lack of knowledge on the part of witnesses in regard to availability of protective measures.**

21.6.1 There is a problem with the effectiveness of various protective measures within sections already in place in the **Criminal Procedure Act**: this relates to a lack of knowledge by potential applicants and a failure on the part of certain public prosecutors to inform witnesses of the availability of measures provided for under these sections. Two examples suffice to illustrate the problem:

- In a submission to the Commission **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC and the ANC Parliamentary Women's Caucus)** report that although section 153(3A) of the **Criminal Procedure Act** explicitly provides for the exclusion of persons in *in camera* hearings "unless the witness requests otherwise", experience has taught that prosecutors seldom inform victims of this option with the result that family members or counsellors of victims are also excluded. In addition, presiding officers are reluctant to allow these requests because of an (incorrect) assumption that section 153(3) implies a "blanket" exclusion.
- The nationwide efficacy of the intermediary system is undermined by the fact that public prosecutors often fail to inform witnesses of the availability of measures provided for under section 170A of the **Criminal Procedure Act 51 of 1977** (the section provides for the use of intermediaries).

21.6.2 The Commission recognises that the lack of knowledge on the part of witnesses as to what protective measures they can access is a serious problem and is of the view that there are three possible ways to solve this problem.

21.7 **Option One**

21.7.1 The first option is to place a duty on prosecutors to inform witnesses of the potential availability of the protective measures. This could be done at any stage in the proceedings, but preferably prior to the bail hearing (when the witness is to give evidence at that hearing) or if the witness is to give evidence at the trial, prior to trial. The court would then be required to enquire from the prosecutor whether the witness has been notified of the availability of such protective measures, and to require the court to make an endorsement on the court file to this effect. If the answer to that question is in the affirmative, the next issue is whether the duty of witness notification should be included in legislation. The Commission is concerned that the inclusion of a duty of witness notification in legislation may give rise to a multiplicity of appeals or reviews which may be brought by the accused. The advantage of this duty is that it would be cost effective, fairly simple and in effect be on the job training.

21.8 **Option Two**

21.8.1 The second option is to accept that the failure to inform a witness that they may request the use of protective measures is due to inadequate training and to recommend that the problem be solved by appropriate training. Further, that witnesses be educated about the protective measures that they may request by virtue of pamphlets and the like.

21.9 **Option Three**

21.9.1 A third option is to place a duty on prosecutors to notify witnesses of the protective measures available and place it in the National Director of Public Prosecution's guidelines. A failure to comply with this duty will constitute a matter for discipline of the particular prosecutor. The shortcoming of this option is that the internal public service guidelines are not generally available to the public. Further, if disciplinary action is taken it will not assist the witness who should have benefited from the protective measure.

21.10 **Recommendations**

21.10.1 The Commission is of the opinion that there is merit in all three options set out above and the broad-based approach represented by these options. **The Commission recommends introducing the witness notification system, the training of court officials**

and communicating information to prospective witnesses. It is further recommended that the placing of a duty on prosecutors to notify witnesses of the protective measures available be referred to the National Director of Public Prosecutions for inclusion in guidelines. A failure in the duty should amount to a matter for discipline of the particular prosecutor.

21.10.2 The Commission recommends the inclusion of the following provisions in the new Sexual Offences Act:

Witness to be notified of protective measures

11. (1) The prosecution shall, prior to the commencement of criminal proceedings in which a person is charged with the alleged commission of a sexual offence, and where practicable, prior to bail proceedings, inform a witness who is to give evidence in that proceedings, or if such witness is below the age of eighteen years, such witness, his or her parent, guardian or a person *in loco parentis*, of the possibility that he or she may be declared a vulnerable witness in terms of section 13 and of the protective measures listed in paragraphs (a) to (g) of section 13(4).

(2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in that subsection and shall note the witness's response in the court file, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.

The Commission also makes the following non-legislative recommendations:

2. The Department of Justice and Constitutional Development should develop and establish a training programme to be attended by prosecutors and presiding officers to ensure proper training in regard to witness notification. In this context the term 'presiding officers' refers to both magistrates and judges.

- 3. The Department of Justice and Constitutional Development should task its communication section to launch a victim empowerment programme to inform witnesses, possibly by way of pamphlet, of the protective measures (including the use of an intermediary) that may be requested.**

- 5. The National Director of Public Prosecutions should develop guidelines which places a duty on prosecutors to notify witnesses of the protective measures that they may request, failure of which will lead to a disciplinary inquiry.**

CHAPTER 22

IN CAMERA HEARINGS

22.1 Introduction

22.1.1 In general it is desirable that criminal trials be held in open court so that justice can be seen to be done. This principle is aptly illustrated by the following *dictum* of Lord Diplock:

Publicity is the very soul of justice. It is the keenest spur to exertion ...It keeps the Judge under trial.¹

22.1.2 It is now a well established general principle of both public policy and constitutional law that all criminal trials should be held in open court.² The requirement of a public trial is based on the dual interests of protecting accused persons from secret trials and enhancing public confidence in the administration of justice.³

22.1.3 Briefly, the following provisions in the **Criminal Procedure Act** and the **Inquest Act**⁴ cater for situations where, for a variety of reasons, it is desirable to depart from the general provision that criminal trials should be held in open court:

- Section 153 of the **Criminal Procedure Act** which deals with *in camera* hearings.
- Section 154 of the **Criminal Procedure Act** provides for the prohibition of publication of certain information relating to criminal proceedings.
- Section 158 of the **Criminal Procedure Act** provides that all criminal proceedings in any court shall take place in the presence of the accused, unless expressly provided for. Subsection (2) allows for the use, subject to satisfaction of certain jurisdictional

1 **Harman v Home Office** 1983 AC 280 at 303d.

2 Section 35(3)(c) of the 1996 Constitution provides for the right of an accused person to a public trial before an ordinary court. Prior to the introduction of the Interim Constitution, the Criminal Procedure Act 51 of 1997 already provided (in section 152) that criminal proceedings 'shall take place in open court' (except where expressly provided otherwise).

3 Nico Steytler **Constitutional Criminal Procedure** (1998) at 250.

4 Act 58 of 1959.

requirements, of closed circuit television and other electronic means.

- Section 170A of the **Criminal Procedure Act** provides for giving evidence through an intermediary.
- Section 335A of the **Criminal Procedure Act** prohibits the publication of the identity of persons towards or in connection with whom it is alleged that an indecent act was committed or any act for the purpose of furthering or procuring an indecent act towards or in connection with any other person.
- Section 10(1) of the **Inquest Act**⁵ dispenses with the need for oral evidence. Section 10(2) of the **Inquest Act** enables the judicial officer to direct whether an inquest shall be held in public.

The relevant provisions in the **Criminal Procedure Act** are dealt with below.

22.2. Current position

22.2.1 A complainant in a sexual offence case may find it extremely embarrassing to testify in open court. However, the obvious remedy - excluding the public - conflicts with the basic principle that the judicial process should be conducted as openly as possible.⁶

22.2.2 In **Nel v Le Roux NO**,⁷ the Constitutional Court confirmed that there are well recognised exceptions to the rule that all criminal proceedings should be held in open court. These exceptions are set out, for example, in section 153 of the **Criminal Procedure Act**⁸ and in section 5 of the **Magistrates' Courts Act**.⁹ Steytler explains that every exception as provided for by statute is *prima facie* unconstitutional but may be justified in terms of the limitation clause.

22.2.3 Section 153 of the **Criminal Procedure Act** provides as follows:

5 58 of 1959.

6 Section 152 of the **Criminal Procedure Act** 1977. See also Kriegler J Hiemstra: **Suid-Afrikaanse Strafproses** Durban Butterworths 5th ed (1993) at p 383 -385.

7 1996 1 SACR 572 (CC).

8 Act 51 of 1977.

9 Act 32 of 1944.

153 Circumstances in which criminal proceedings shall not take place in open court:

(1) If it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct-

- (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;
- (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-

- (a) any indecent act towards or in connection with any other person;
- (b) any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; or
- (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person in loco parentis, requests otherwise.

(4) Where an accused at criminal proceedings before any court is under the age of eighteen years, no person, other than such accused, his legal representative and parent or guardian or a person in loco parentis, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person in loco parentis, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his presence is authorized by the court.

22.2.4. Section 153(1) of the **Criminal Procedure Act** applies to all criminal cases and empowers the court to order an *in camera* hearing when it “would ... be in the interests of the security of the State or of good order or of public morals or of the administration of justice”.

22.2.5 Section 153(2) is applicable to all criminal cases and provides that the court may authorise an in camera hearing when “there is a likelihood of harm to any person, other than the accused if he testifies at such proceedings”. Subsection (2) has a more personal focus on witnesses and their needs.

22.2.6 It has been held that the quantum of proof required in terms of section 153(2), that is a reasonable possibility, is less than that required in terms of section 153(1) which requires that it must appear to the court that it would (not might) be in the various interests listed therein.¹⁰ It is, however, arguable that a “likelihood of harm” is more onerous than an “interest”.

22.2.7 In practice, where there is “the likelihood of harm” the State tends to rely on section 170A which makes provision for the use of an intermediary and gives greater protection to a witness.¹¹

22.2.8 Section 153(3) not only applies to child complainants, but includes all complainants in criminal proceedings involving an indecent act. Section 153(5) applies to child witnesses only.

22.3 Submissions

22.3.1 Some of the respondents are of the opinion that the general public should be

10 See **S v Madlava** 1978 (4) SA 42 (T); **S v Manqina** 1994 (2) SACR 692 (C).

11 Helene Combrinck, former prosecutor and currently researcher at the Community Law Centre, Gender Project, University of Western Cape.

excluded from the trial in sexual offence cases¹² and that consideration should be given to who is present in court.¹³ In the opinion of **Ms WL Clark** the present measures are on the whole sufficient for most cases when the victim testifies, but she says prosecutors dealing with these cases should routinely canvass this question and implement the child's wishes wherever possible.¹⁴ The opinion is held by the **Department of Health and Welfare, Mpumalanga Province** that a child should have the choice of whether he or she wants a parent or significant other with him or her while he or she is testifying.

22.3.2 Although this is the ideal, **Adv Meintjies**¹⁵ points out that no provision is made in Section 153 of the Criminal Procedure Act for eliciting the child victim's views. She therefore feels that additional measures are necessary. She points out that the child might not want his or her parent, guardian, person *in loco parentis* present at all. She suggests that provision be made also for the prosecutor to make a request on behalf of the child or upon such child's request, as to who should be excluded from the proceedings and that the child should be duly informed of this right. The opinion¹⁶ is also held that even though there is no requirement that the court should be satisfied that harm would result to the victim, if such persons remain present, presiding officers often require an indication of potential harm or distress before allowing this exclusion.

22.3.3 The view is held by **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC and the ANC Parliamentary Women's Caucus)** that although the section explicitly provides for the exclusion of persons *unless the witness requests otherwise* (section 153(3A)), experience has taught that prosecutors seldom inform victims of this option with the result that family members or counsellors of victims are also excluded. In

12 **Sr Potter, Agape School for the Cerebral Palsied; Snr Supt JW Booysen, Serious Violent Crime: KwaZulu Natal, SAPS.**

13 **Association for persons with physical disabilities, Northern Cape; L Soato, Bloemfontein Child Welfare Society; H Reyneke, Vryheid Child Welfare Society; Ms A Dreyer, H Coertze & I Swart, South African National Council for Child and Family Welfare; Sr Potter, Agape School for the Cerebral Palsied; Ms K Vervaart, Department of Social Services, Provincial Administration: Western Cape.**

14 **Magistrate's Office, Verulam.**

15 **Office of the Director of Public Prosecutions.**

16 **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC and ANC Parliamentary Women's Caucus.**

addition, presiding officers are reluctant to allow these requests because of an (incorrect) assumption that section 153(3) implies a “blanket” exclusion.

22.4 Comparative Law

22.4.1 Western Australia

22.4.1.1 In Western Australia there are a number of exceptions to the general rule that a criminal trial must be conducted in a public court with open doors.¹⁷ The exceptions are as follows:

- Under common law a judge may exclude the public where it is necessary for the administration of justice. This might be necessary where there is an apprehension of disorder.
- In terms of section 635A of the **Criminal Code**¹⁸ the court may in its discretion exclude all or any persons not directly interested in the case from the court room or place of trial where either:
 - (a) the accused is under the age of 18 years; or
 - (b) the charge is an offence of an indecent nature against a person under the age of 18.
- In terms of section 65 of the **Justices Act** 1902, the court may exclude all or any persons where the interests of public morality so require.

22.4.2 South Australia

22.4.2.1 In South Australia, section 69(1a) of the **Evidence Act (SA)** of 1929 has reversed the presumption of a public trial in child sexual abuse cases in favour of a hearing where the only persons permitted to be present are:

- those whose presence is required for the purposes of the proceedings;

17 Law Reform Commission of Western Australia Report on **Evidence of Children and other Vulnerable Witnesses** Project Number 87 The April 1991 at p 95ff. The following section on Australia, New Zealand, Scotland and the United Kingdom draws largely on this report.

18 **Criminal Code Compilation Act** 1913.

- a support person for the child; and
- any other person, who in the opinion of the court, should be allowed to be present.

22.4.2.2 Even in those Australian jurisdictions where special provision has been made for alternative modes of giving evidence by children in sexual abuse cases, the trend is to treat closure of the court as a matter of judicial discretion.¹⁹

22.4.3 Canada

22.4.3.1 Canadian legislators have recognised the need to protect young witnesses, but have left it as a matter to be determined by judicial discretion. However, judicial officers are given specific direction on the meaning of “proper administration of justice” which includes protecting a young witness in a sexual offence trial or a trial involving violence. Thus, section 486(1) of the Canadian **Criminal Code**²⁰ provides that:

In any proceedings a presiding officer may, if he is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or any part of the proceedings, he may order so.

Further, subsection (1.1) provides that:

For the purposes of subsection (1) and (2.3) and for greater certainty, the proper administration of justice” includes ensuring that the interests of the witnesses under the age of eighteen years are safeguarded in proceedings in which the accused is charged with a sexual offence or an offence in which violence against the person is alleged to have been used, threatened or attempted.

22.4.4 United States

22.4.4.1 In the United States it has been accepted that hearings *in camera* in respect of rape cases may be a legitimate exception to the rule that all trials be heard in open

19 Section 21A(2)(b) of the (Qld) **Evidence Act** 1977; section 9(e) of the (Vic) **Supreme Court Act** and section 126(1)(d) of the **Magistrates’ Court Act** 1989.

20 The 1996 **Annotated Tremears Criminal Code** by D Watt and M Fuerst Ontario: Carswell 1996.

court. This was held in the decision of **Richmond Newspapers Inc. v Virginia**²¹ where Richmond Newspapers challenged the validity of a statutory provision which required judges at trials for specified sexual offences involving victims under the age of 18, to exclude the press and general public from the courtroom during the testimony of those victims. The plaintiff contended that this was a violation of the guarantee of freedom of the press in the First Amendment to the US Constitution.

22.4.4.2 In its analysis of the First Amendment in relation to access to criminal trials, the court found there had always been ‘an unbroken tradition of openness’, but added that there was at least one notable exception to this tradition: in cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult.

22.4.4.3 The court further held that the mandatory closure rule furthered genuine state interests and that these interests would be defeated if a case-by-case determination were used. Thus, even though mandatory closure would result in a temporary diminution of the public’s knowledge at these trials, the court did not think that it was of such a nature to render the statute invalid, especially when considering the statute’s scope and intention in terms of being sensitive to the needs of victims.

22.4.4.4 A different approach was taken in **Globe Newspapers Co v Superior Court for Norfolk County**²² where the appellant had likewise been excluded from a rape trial, and challenged the constitutionality of the statute. The court held that the statutory provision in question did violate the First Amendment on the following basis: the right of access to criminal trials needed to be protected and by providing for trials to be open to the press and public, one ensured that the right played a significant role in the functioning of the judicial process. However, the court added that the right of access to criminal trials was not absolute and there might be circumstances where the press and public could be barred. In this regard the state must show that the denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.

22.4.4.6 As far as the statute in question was concerned, it was found that the provision was designed ‘to encourage young victims of sexual offences to come forward and

21 448 US 556 (1980).

22 457 U S 596 (1982) (USSC).

to preserve their ability to testify by protecting them from undue psychological harm at trial'. While the court recognised that these were important interests, it found that these interests did not justify a mandatory closure in all cases and held that it should be determined on the basis of the trial court's discretion (i.e. on a case by case basis). The court found that barring the press had not been warranted, based on the fact that the press had already been given the names of the parties involved and had access to the criminal transcript. It was found that while the exclusion may be unconstitutional in one case, it may not be so in another case and in weighing up the trauma to the victim one needed to have regard to the facts of each individual case.

22.4.4.7 While this case does create problems in terms of leaving the decision in the hands of the judicial officer, the case is illustrative in the sense that the court recognised that the right of access to the public is not an absolute right and that there may be instances where the state has a compelling interest to protect the interests of the witness.

22.4.5 **England and Wales**

22.4.4.5.1 In England and Wales the Court may decide to sit *in camera* on certain occasions - this is based on the common law power of the court, but is rarely used (or necessary in view of other measures to protect the child witness). The publication of proceedings heard in camera is an offence.²³

22.5 **Evaluation**

22.5.1 South African courts currently make a case by case determination as to whether a hearing should be held *in camera*. Project Committee members²⁴ report that while a court will generally order that a rape victim's testimony be heard behind closed doors,²⁵ there is in practice very little control over the movement of people in and out of court, even when a child victim is giving evidence. It also appears from the submissions received by the Commission

23 Paper presented at the Second Annual Conference and General Meeting of the International Association of Prosecutors, 1997. See also Section 12 **Administration of Justice Act** 1960.

24 Ms J van Niekerk Childline Kwa-Zulu Natal and Ms B Pithey who was that at Rape Crisis Cape Town.

25 This is not always the case.

to Issue Paper 10 that there are a number of practical problems.

22.5.2 Section 153(3) of the **Criminal Procedure Act**²⁶ does not apply to all criminal cases, and for the purposes of this Discussion Paper, it deals with an indecent act or conduct that procures or furthers an indecent act. The subsection provides that the court has a discretion and **may** order in camera hearings, on the request of the person against whom the indecent act was committed (or their parent or guardian if that person is a minor).

22.5.3 The advantage of this subsection is that it does not require that any harm or stress be established for the court to exercise its discretion. Inherent in this formulation is the assumption that for a victim of an indecent act to give evidence in open court it will be stressful.

22.5.4 The Commission believes there are two issues to be considered in relation to any proposed amendment of this section. These are dealt with below:

22.6 An *in camera* hearing is not a blanket exclusion of all persons from court.

22.6.1 This issue relates to section 153(3A) and was raised by **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC and the ANC Parliamentary Women's Caucus** who point out that although the section explicitly provides for the exclusion of persons "*unless the witness requests otherwise*" (section 153(3A)), experience has taught that prosecutors seldom inform victims of this option with the result that family members or counsellors of victims are also excluded. In addition, presiding officers are reluctant to allow these requests because of an (incorrect) assumption that section 153(3) implies a "blanket" exclusion.

22.6.2 To avoid the "blanket" exclusion approach, section 153(3A) of the **Criminal Procedure Act**²⁷ could be amended by inserting a cross-reference to the clause in the proposed sexual offences legislation dealing with the authorising of support persons to victims of a sexual offence.²⁸ Further, specific mention could be made in section 153(3A) to confirm

26 51 of 1977.

27 51 of 1977.

28 See further Chapter 29 on **Support Persons**.

that the exclusion of persons is not a blanket exclusion and that complainants have the right to have support person(s) of their choice present during the trial.

22.6.3 The other option is to solve this problem by additional training of both magistrates and prosecutors to correct this “incorrect assumption” rather than legislating for errors or mistakes in understanding the law, and to ensure witness notification. This option is included in Chapter 20 which deals with vulnerable witnesses, the need to ensure the appropriate and proper implementation of protective measures available to witnesses and witness notification.

22.6.4 The Commission elects both options in this regard. **Firstly, the Commission recommends that a cross reference be made in the section 153(3A) of the Criminal Procedure Act to the clause in the proposed Draft Bill (on sexual offences) providing for support persons to witnesses of a sexual offence.** Further, the training option is dealt with in Chapter 21 and is not repeated at this point.

22.7 Movement of persons in and out of court during an *in camera* hearing.

22.7.1 A further problem is that there is in fact little control exercised over the movement of people in and out of sexual offence trials in general . This is problematic as the testimony of a witness may be inaccurate or markedly inhibited through fear, emotional trauma, etcetera. This is particularly problematic if the witness is vulnerable as it is highly likely to compound their experience of vulnerability.

22.7.2. **The Commission recommends that the movement of both court officials and private persons, in and out of the court whilst a vulnerable witness is testifying either in the court or through an intermediary should be strictly monitored. This provision should be enforced and adhered to by requiring that all courts hearing sexual offence cases shall, when the matter is being held *in camera*, have a notice to that effect on the public doors to the court.**

22.7.3 **The movement of court officials whose presence is necessary for the trial should be limited to that which is necessary and a duty placed on court officials to limit their movement in and out of court when such a hearing is taking place. These**

recommendations do not require legislation, but should be enforced administratively by the Department of Justice: Courts Division.

22.8 Recommendations

1. The amendment of section 153 by the substitution for subsection (3A) of the following subsection:

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person *in loco parentis*, requests otherwise or unless the court has directed, in terms of section 14 of the Sexual Offences Act, 20.. (Act No. xx of 20..), that such other person shall be accompanied by a support person in which case the support person shall not be deemed to be a person whose presence is not necessary at such criminal proceedings.

2. The movement of both court officials and private persons, in and out of the court whilst a vulnerable witness is testifying either in the court or through an intermediary should be strictly monitored. This provision should be enforced and adhered to by requiring that all courts hearing sexual offence cases shall, when the matter is being held *in camera*, have a notice to that effect on the public doors to the court.
3. The movement of court officials whose presence is necessary for the trial should be limited to that which is necessary and a duty placed on court officials to limit their movement in and out of court when such a hearing is taking place. These latter recommendations do not require legislation, but should be enforced administratively by the Department of Justice: Courts Division.

CHAPTER 23**PROHIBITION OF PUBLICATION OF CERTAIN INFORMATION RELATING TO CRIMINAL PROCEEDINGS.****23.1 Current Law**

23.1.1 Section 153 of the **Criminal Procedure Act**¹ must be read with sections 154 and 335A of the **Act** which relates to the publication of certain information in connection with criminal trials.

23.1.2 Section 154 of the **Criminal Procedure Act** prohibits the publication of certain information relating to criminal proceedings as follows:

Section 154

(1) Where a court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever: Provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 153 (1), in which event the court may direct that such part shall not be published.

(2) (a) Where a court under section 153 (3) directs that any person or class of persons shall not be present at criminal proceedings or where any person is in terms of section 153 (3A) not admitted at criminal proceedings, no person shall publish in any manner whatever any information which might reveal the identity of any complainant in the proceedings: Provided that the presiding judge or judicial officer may authorize the publication of such information if he is of the opinion that such publication would be just and equitable.

(b) No person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153 (3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question.

(3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the

¹ 51 of 1977.

presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.

(4) No prohibition or direction under this section shall apply with reference to the publication in the form of a bona fide law report of-

- (a) information for the purpose of reporting any question of law relating to the proceedings in question; or
- (b) any decision or ruling given by any court on such question,

if such report does not mention the name of the person charged or of the person against whom or in connection with whom the offence in question was alleged to have been committed or of any witness at such proceedings, and does not mention the place where the offence in question was alleged to have been committed.

(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153 (2), shall be guilty of an offence and liable on conviction to a fine not exceeding R1 500 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

23.1.3 No person may publish any information which might reveal the identity of any complainant where the court has made an order in terms of section 153(3) of the **Criminal Procedure Act**.² Further, section 335A of the **Criminal Procedure Act** prohibits publication of the identity of persons towards or in connection with whom it is alleged that an indecent act was committed or any act for the purpose of procuring or furthering an indecent act. This section applies prior to the identity of an accused being established. No person may at any stage before the appearance of an accused in a court on a charge referred to in section 153(3) of the Criminal Procedure Act, 1977 or at any stage after such appearance but before the accused has pleaded to the charge, publish any information relating to the charge in question.³

Section 335A provides as follows:

(1) No person shall, with regard to any offence referred to in section 153 (3) (a) and (b), as from the date on which the offence in question was committed or allegedly committed, until the prohibition in terms of section 154 (2) (b) of the publication of information relating to the charge in question commences, publish any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except with the authorization of a

² Section 154(2)(a) of the **Criminal Procedure Act** 51 of 1977.

³ Section 154(2)(b) of the **Criminal Procedure Act** 51 of 1977. See also section 335A of the same Act.

magistrate granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 500 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

23.2 **Problem stated**

23.2.1 Notwithstanding the various provisions of the **Criminal Procedure Act** it has become common place for the media to report on sexual offences or alleged sexual offences, sometimes by including names or identifying details of the victim and / or the alleged offender and or graphic details of the assault.

23.3 **Comparative analysis**⁴

23.3.1 **Canada**

23.3.1.1 In **Canadian Newspapers v Canada (Attorney General)**⁵ the press challenged the constitutionality of section 442(3) of the Canadian Criminal Code. This section provided that in sexual offence cases the court is obliged to make an order (on application by the complainant or prosecutor) prohibiting the publication of the complainant's identity. It was argued that this provision infringed on the right to a public hearing.

23.3.1.2 The Supreme Court of Canada held that the publication ban did not violate the right to a public trial, by virtue of the fact that the press could enter the courtroom. It could however be said to violate the freedom of the press. The court's conclusion was that the provision was saved by application of the 'limitation' test under section 1 of the Charter, and was therefore not inconsistent with the Charter.

23.3.1.3 The court expressed the opinion that the legislative objective, i.e. to encourage complainants to come forward without fear of the embarrassment and humiliation which widespread publication would engender, was 'a pressing and substantial concern'. This

⁴ For the American position see paragraph 23.4.4.1 -23.4.4.7 above where the relevant principles are discussed dealing with two issues, namely, *in camera* hearings and the prohibition on publication.

⁵ (1988) 52 DLR (4th) 690 (SCC).

provision sought to facilitate the prosecution of sexual offenders and ultimately the suppression of crime.

23.3.2 **Australia**

23.3.2.1 As is the case in most jurisdictions, it is a fundamental principle, in Western Australia, that the administration of justice should be open and “the freedom to report trials is one of the essential freedoms”.⁶ However, the rule requiring open justice is not absolute and there are exceptions to it. Section 36C of the **Evidence Act** 1906 contains an exception which is aimed at prohibiting the publication (which includes broadcasting) of the names of complainants in the case of a sexual offence. Subsection (1) prohibits such a publication after a person is accused of a sexual offence. A person is accused of a sexual offence if, *inter alia*, a complaint is made under the **Justices Act** 1902 alleging that a person has committed a sexual offence. Section 36C(1) makes it explicit that if the complaint is attending school, “no matter likely to lead members of the public to identify the school shall be published”.

23.3.2.2 The penalty for failing to comply therewith is, on summary conviction, a fine not exceeding \$500.

23.3.2.3 The above provisions are augmented by section 35 of the **Children’s Court of Western Australia Act** 1998 which restricts publication of any proceedings in court containing particulars likely to lead to the identification of a child who has been charged with an offence, or is a witness or against whom an offence is alleged to have been committed. The penalty for failing to comply with the prohibition is a fine of \$10 000 or imprisonment of 12 months.

23.3.2.4 Western Australia has a further interesting provision contained in section 11A of the **Evidence Act** 1906 which authorises a judge to restrict publication of evidence in any proceeding where the judge considers that publication “may tend to prejudice any prosecution that has been or may be brought” against a person. “Proceeding” includes any action, trial, inquiry, cause or matter, whether civil or criminal.⁷ This goes beyond the object of protecting a witness to encompass the interests of the proper administration of justice.

⁶ Per Ackner LJ in **R v Horsham Justices; ex parte Farquharson** [1982] 1 QB 762 at 798.

⁷ Section 3 **Evidence Act** 1906.

23.3.2.5 Both South Australia and New South Wales have similar provisions prohibiting publication of proceedings involving children's or complainants' identity in cases of a sexual offence.⁸

23.3.3 United Kingdom

23.3.3.1 Various legislative enactments prohibit or restrict publication of details pertaining to allegations of sexual offences. The **Youth Justice and Criminal Evidence Act 1999** contains three provisions that restrict reporting: section 44 places restrictions on reporting alleged offences involving persons under 18 years of age; section 45 empowers the court to restrict reporting of criminal proceedings involving persons under 18 years of age; and section 46 empowers the court to restrict reports about certain adult witnesses in criminal proceedings. In the latter section if the court determines that the witness is eligible for protection and that a restriction on reporting is likely to improve the quality of evidence or the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case. Reporting in contravention of these provisions constitutes a criminal offence liable to a fine not exceeding level 5 of the United Kingdom standard scale. Section 11 of the **Industrial Tribunal Act 1996** provides that industrial tribunal procedure regulations may include a provision that limits making available documents so as to prevent the identification of any person affected by or making the allegation of a sexual offence.

23.3.4 Namibia

23.3.4.1 On 15 June 2000 Namibia's **Combatting of Rape Act 2000** came into operation. Section 15 of that Act amends section 153 of Act 51 of 1977 by providing that in criminal proceedings involving an offence of a sexual nature, when a court orders an *in camera* hearing, no person shall publish in any manner any information which might reveal the identity of the complainant. This is subject to two provisos: first, the presiding officer may authorise publication if he or she is of the opinion that it is just and equitable to do so; second, if the complainant is over 18 years of age.

⁸ Section 71A (4)(b) of the **Evidence Act 1929** (South Australia); Section 11 of the **Children (Criminal Proceedings) Act**.

23.3.5 South Africa

23.3.5.1 The South African media are, in terms of section 12 of the **Divorce Act** 70 of 1979, prohibited from publishing any particulars of a divorce action or any information which comes to light in the course of such an action other than the names of the parties to a divorce action, the fact that a divorce action between the parties is pending in a court of law and the judgment or order of the court.

23.3.5.2 However, since the provision does not have extra-territorial application, the foreign media are unrestricted in their reportage of South African divorce proceedings. Since South Africans have access to foreign media reports the initial purpose of the prohibition is defeated.

23.3.5.3 In view of the above and the fact that there are clear indications that at present the South African media are not complying with section 12 of the **Divorce Act**, the South African Law Commission launched an investigation into this provision. Various options for reform have been put forward and the public invited to comment.⁹

23.4 Submissions

23.4.1 Certain respondents to the Issue Paper were of the opinion that the current legislation is not implemented by the courts or followed by the press with regard to the publication of information which might reveal the identity of a complainant. The wishes of the complainant are not considered in the implementation of either sections 154 or 335A. In this regard it must be pointed out that the name of the complainant is not the only means of identification of the complainant. A complainant could also be identified by means of her place of residence or employment, age or occupation. An example would be the press mentioning that a 35 year old doctor from a particular shift had allegedly been raped after returning home from a night shift on a specified day.¹⁰

⁹ See further the South African Law Commission **Discussion Paper 98** 'Publication of Divorce Proceedings: Section 12 of the Divorce Act (Act 70 of 1979) Project 114 . The closing date for comments 15 June 2001.

¹⁰ **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC and ANC Parliamentary Women's Caucus.**

23.4.2 A contrary view is held by **Mr L I Carr** that the right to be protected from publicity about the offence should be examined critically because the implications of protecting the victim by not publicising in the victim's name, implies that abuse is stigmatising. He submits that the whole meaning in the system of values surrounding abuse needs to be reconsidered in such a way that victims are seen as people who need to be honoured and supported in particular ways. **Mr L I Carr** says that victims need to be protected from publicity is really implying that victimhood is a stigma and is something to be ashamed of. He opines that this reinforces a belief system in our society that victims carry the blame for having been victimised. He therefore feels that victims should be given a choice in this regard.

23.5 Evaluation

23.5.1 Section 154 of the 1977 **Criminal Procedure Act** is aimed at preventing publication in a number of circumstances. The circumstances are as follows:

- When a court has ordered an *in camera* hearing;
- in criminal proceedings which involve charges of an indecent act, no information may be published that might reveal the identity of the complainant;
- in cases of indecency, no details may be published about the charge before the accused has both appeared and pleaded;
- no information may be published which may reveal the identity of accused persons and witnesses under 18 years of age.

23.5.2 Notwithstanding the above prohibitions on publication, the court has a discretion to allow publication in all of the above circumstances, except in cases of indecency in regard to which no details may be published about the charge in question before the accused has appeared and pleaded.

23.5.3 The section also provides for publication in certain circumstances: for the purpose of law reports on a question of law or a ruling or decision of a court.¹¹

23.5.4 Prior to the amendment effected in 1987, section 154 contained a lacuna, the effect of which allowed publication prior to an accused being identified or a charge being laid.

¹¹ Section 154(4) of the **Criminal Procedure Act** 51 of 1977.

This was remedied by the introduction of section 335A of the **Criminal Procedure Act** following recommendations made by the South Africa Law Commission.¹² The gap in the law was overcome by prohibiting publication of any information that may reveal the identity of the person towards or in connection with whom the offence was committed or alleged to have been committed. This prohibition is not absolute and a magistrate may grant an order, in chambers, allowing publication, but must have due regard to the wishes of the person towards or in connection with whom the offence was committed.

23.5.5 **The Commission is of the opinion that the law, as it currently stands, is adequate.** However, a problem clearly exists in practice. Details of complainants/victims of sexual offences, and in particular children, and of persons alleged to be the accused, but not yet formally identified as such or charged, are regularly published contrary to the above legal provisions.

23.5.5.1 This raises the following issues: Firstly, there appears to be a lack of implementation of these provisions with so few cases being instituted against the publishers that there is a disregard for the relevant legal provisions and the dignity of the complainant/victim and the identity of persons not yet formally identified or charged. **In this regard the Commission recommends that the sexual offence unit of the office of the National Director of Public Prosecutions focuses on prosecuting recalcitrant publishers of such details.** It is a serious matter when large media groups and broadcasting houses flout the law by publishing details that are under the protection of the law as embodied in the **Criminal Procedure Act**.

23.5.5.2 **Secondly, the Commission recommends that the penalty portions, as currently set out in of sections 154 and 335A of the Criminal Procedure Act, be revised to provide penalties for publishing information about victims. It should be more serious to publish details of child complainants or any other information that may lead to revealing of the identity of that child and should carry a higher penalty in the form of a monetary fine. Further, such penalty provisions should be included in the new sexual offence legislation.**

23.5.5.3 Lastly, as a discouragement to publication of prohibited or protected information,

¹²

and as reparation to the complainant (or an accused who is subsequently not charged) the Commission is of the opinion that the court hearing the matter should have the discretion to make a compensatory financial order in favour of the complainant or an accused who is subsequently not charged.

23.5.5.4 Currently, section 300 of the **Criminal Procedure Act**¹³ empowers a court to make an award of damages where an offence causes damage or loss of property. This award of damages is restricted to damage or loss of property (including money), but excluding any personal damages.

23.5.5.5 The South African Law Commission Project on Sentencing¹⁴ has proposed enacting a section to include compensation for -

- (a) damage to or the loss or destruction of property, including money;
- (b) physical, psychological or other injury;
- (c) loss of income or support

resulting from the commission of an offence.¹⁵

23.5.5.6 The Commission supports this proposal. Although the **Sentencing Framework Bill** is currently on the legislative Programme for 2001, it will not serve before the Justice Portfolio Committee this year. Further, the Commission cannot guarantee that clause 37 of that Bill will be enacted as legislation as it is not the Commission's decision. It must be borne in mind that the issue of personal damages is of particular relevance to sexual offences where the damage caused is often of a physical or psychological nature. As such **the Commission has elected to recommend that a court hearing a matter of an alleged sexual offence and a court who finds any person guilty of publishing information in contravention of the provisions of section 153 or, 154 or 335A of the Criminal Procedure Act, may make a**

¹³ 51 of 1977.

¹⁴ Project 82.

¹⁵ See further clause 37 **Sentencing Framework Bill** South African Law Commission **Report** 'Sentencing: (A New Sentencing Framework)' November 2000 at p 126.

compensatory financial order after a finding of guilt in terms of section 154(5) of the Criminal Procedure Act.¹⁶ Such an order would be in favour of the complainant or the accused (provided that the latter has not been identified or charged). The court may make such an order on its own accord, or at the request of the State, or the complainant of the alleged offence (or in the case of a minor, their parent, guardian or person *in loco parentis*) or an alleged accused who has not been identified or charged and is subsequently not charged.

23.6 Recommendation

The Commission makes the following recommendations.

1. The sexual offence unit of the office of the National Director of Public Prosecutions should focus on prosecuting any person who publishes prohibited details of reports and cases involving an alleged sexual offence.
2. Section 154 of Act 51 of 1977 should be amended-
 - (a) by the substitution for subsection (5) of the following subsection:

(5) Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine [not exceeding R1 500] or to imprisonment for a period not exceeding two year or to both such fine and such imprisonment if the person in respect of whom the publication or revelation of identity was done, is an adult, and if such person is under the age of eighteen years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

- (b) by the insertion after subsection (5) of the following subsection:

¹⁶ 51 of 1977.

(6) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if (a) the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any indecent act towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; and (b) the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support.

3. Section 335A of the Criminal Procedure Act, 1977, is hereby amended -

(a) by the substitution for subsection (2) of the following subsection:

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine [not exceeding R1 500] or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment if the person whose identity has been revealed is an adult, and if such person is under the age of eighteen years, to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

(b) by the insertion after subsection (2) of the following subsection:

(3) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (2), and if the person whose identity has been revealed suffered any physical, psychological or other injury or loss of income or support.

CHAPTER 24

CLOSED CIRCUIT TELEVISION

24.1 Introduction

24.1.1 Closed circuit television allows a witness to give evidence outside the presence of the accused in a separate room. Where closed-circuit television is used the witness usually a child is placed in a room adjacent to the courtroom and, by the use of a television camera, an audio visual image of the witness is transmitted to a monitor screen, or monitor screens, in the courtroom. The court, is thus able to view the witness and their responses through a television screen placed in the courtroom.

24.1.2 The use of closed circuit television in court is not limited to use by a child witness, but is available to assist any traumatised witness to give evidence. The accused may also testify by way of closed circuit television.¹

24.2 Current Law

24.2.1 In 1996 section 158(2) and (3) of the **Criminal Procedure Act**, was enacted² as a result of recommendations made by the South African Law Commission.³ In terms of sections 158(2) and (3), a court may order that a witness (if he or she consents thereto) give evidence outside of the presence of the accused by means of closed circuit television or similar electronic media. However, the court may only make such an order if facilities therefor are readily available and if it appears to the court that to do so would -⁴

- prevent unreasonable delay;
- save costs;
- be convenient;

1 Section 158(2) (a) and (b) of the **Criminal Procedure Act** 51 of 1977.

2 Section 7 of Act 86 of 1996.

3 **Interim Report on the Simplification of Criminal Procedure** Project 73 August 1995.

4 For a discussion of the arguments, see Law Reform Commission of Victoria **Report No.18: Sexual Offences against children** at p 103 - 105.

- be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
- prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

24.3 **Comparative analysis**

24.3.1 Only brief mention is made here of comparative systems as a complete study thereof was made in the South African Law Commission's **Interim Report on the Simplification of Criminal Procedure**.⁵

24.3.2 **Scotland**

24.3.2.1 The Scottish Law Commission was initially opposed to this measure as it considered that a child who was too frightened to give evidence in court was unlikely to be any less frightened if required to sit in a distant room, accompanied by a camera or screen, and speaking to a disembodied voice emerging from one of those screens. After considering the successful use of closed-circuit television in England and Wales, the Scottish Law Commission has had occasion to change its point of view and have found that this arrangement need not be obtrusive or threatening from the point of view of the child, and that it need not, and does not, present problems from the point of view of the judge and counsel.⁶

24.3.3 **United States of America**

24.3.3.1 Currently 26 States in the United States permit the use of closed circuit television in one form or another as an aid to taking the evidence of children. In the United States there are essentially two systems in use for achieving this: a one-way system, and a two-way system. Under the one-way system in its most extreme form the child merely hears, but cannot see, the person putting questions to him or her. In a less extreme form the child may also have a monitor screen in his or her room on which is the image of the person asking the questions at the time is projected.

5 Project 73 August 1995.

6 Report on the 'Evidence of Children and Other Potentially Vulnerable Witnesses' 1990 at p 21.

24.3.3.2 Under the two-way system there is a complete interchange of images. In that case the child may have several monitor screens in his or her room and will be able to see the judge, the jury, the accused, and the lawyers taking part in the case. Whichever system is in place, some States permit the child to have a supportive adult in the room with him or her. Furthermore, Connecticut and Florida statutes require the judge to be in the room where the child is testifying (though apparently not anyone else). By contrast, and somewhat surprisingly, the Alabama statute requires the accused to be in the room with the child.

24.3.4 **England and Wales**

24.3.4.1 Following on the passing of the **Criminal Justice Act 1988**, live closed circuit television systems have been introduced into courts in England and Wales. From the technical point of view the important features of the systems are that they are entirely automatic and do not require the attendance of camera operators or technicians, and second, that they provide both the judge and counsel with an opportunity to watch not only the child but others as well.

24.3.4.2 This method proved to reduce distress for the child and ensures that the child will in fact be able to give evidence. It is to be noted that there was no statutory provision for an intermediary through whom questions from counsel and the court could be relayed.⁷

24.4.3 The law was substantially reformed by the **Youth Justice and Criminal Evidence Act 1999**. Section 29 thereof provides for a special measures direction for the examination of a witness to be conducted through an intermediary.

24.4 **Submissions received**

24.4.1 The majority of respondents to Issue Paper 10 are in favour of the continued use of closed circuit television. The underlying rationale is that the use of closed circuit television serves to reduce further trauma of standing face to face with the offender.⁸

7 L Hayano 'Special Measures Directions for Child Witnesses' **Wadham College** Oxford November 2000 at p 2.

8 **Association for the Physically Disabled (Eastern Cape - Port Elizabeth Region);; Linda de Rooster (Forest Town School for the Cerebral Palsied Children); SAPS Social Work Service Head Office Management; South African National Council for Child and Family Welfare; Tshwaranang Legal Advocacy Centre.**

24.4.2 Two respondents felt that closed circuit television should not be a matter of discretion for the court, but rather a mandatory protective measure available to child witnesses.⁹

24.5 Evaluation

24.5.1 Constitutionality

24.5.1.2 According to section 158 of the **Criminal Procedure Act**, the accused must be present at all criminal proceedings. Section 158(3) clearly presents an exception to this rule. However, Steytler argues convincingly that this exception does not appear to be inconsistent with an accused's right to be present at trial.¹⁰ While one should acknowledge that section 158(3) constitutes a limitation of the right of the accused to be present, we argue that this limitation is reasonable and justifiable when measured against the criteria prescribed in section 36(1) of the Constitution.

24.5.2 Who may bring an application to give evidence by way of closed circuit television.

24.5.2.1 Sections 158 (2)(a) and (b) authorise the court or prosecutor, a witness or accused to bring an application for evidence to be given by means of closed circuit television. There is no specific mention of who should bring an application on behalf of a child witness. Should it be the child or its parent or guardian, or a person *in loco parentis*? However, in view of the development and proposed introduction in this Discussion Paper¹¹ of the category of "vulnerable witnesses", it is not necessary to specifically authorise a child witness or parent, guardian or person *in loco parentis* to bring such an application by amending section 158(2) of the **Criminal Procedure Act**.¹² Accordingly, no comment is made on the current test to determine whether a witness qualifies to have the assistance of an intermediary.

24.5.3 Concurrent use of protective measures or aids

9 **Agape School for the Cerebral Palsied (Sr. M D Potter); SAPS Provincial Commander Serious Violent Offences Kwa Zulu Natal.**

10 N Steytler **Constitutional Criminal Procedure** (1998) at 295.

11 See Chapter 20.

12 51 of 1977.

24.5.3.1 Section 158(2)(a) specifically authorises the court to make an order allowing use of a closed circuit television “or similar electronic means”.

24.5.3.2 The Commission does not have a difficulty with the current formulation and proposes that it should stand, provided that it can be ordered together with or regardless of whether any other protective measure or communication aid has been ordered. Provision has been made for this in Chapter 20.

24.5.4 **Jurisdictional requirements**

24.5.4.1 There are two issues that need to be considered in relation to the court’s jurisdiction to order the use of closed circuit television.

24.5.4.2 Firstly, section 158(3) provides that a court may order that a witness gives evidence by way of closed circuit television, only if facilities therefor are readily available or obtainable. There is no reported case law on the meaning of the word “obtainable” in relation to this section. Given its ordinary meaning, “obtainable” suggests that if facilities can be gained or acquired for the court hearing the matter. However, what should happen to a witness in criminal proceedings involving a sexual offence, where the court is of the opinion that evidence should be given by way of closed circuit television, but facilities therefor are not available?

24.5.4.3 As the law now stands the court would not be empowered to grant such an order as the court’s discretion only arises if “facilities therefor are readily available or obtainable”. The Commission is of the opinion that it is necessary to retain the provision that specifies that before a court may make an order for use of closed circuit television, facilities therefor must be readily available or obtainable otherwise the court would be ordering an impossibility. However, should that be the end of the matter or should the court have a further discretion to order the transfer of the case to a court with the required facilities?

24.5.4.4 This question relates to the jurisdiction of a court. Currently, the following sections of the **Criminal Procedure Act** determine the jurisdiction of a court:

- Section 89 provides that magistrates courts may try any offence excluding murder, rape and treason. The regional court may try any matter excluding treason.
- Section 90 provides that a court, subject to section 89, may try an offence committed

within its territorial jurisdiction.¹³

- Section 92 places limits on the jurisdiction of courts in regard to sentences that they may hand down.
- Section 110 provides that if an accused person is brought before a court which lacks jurisdiction and the accused fails to plead lack of jurisdiction, that court will be deemed to have jurisdiction in respect of the offence in question.
- Section 111(1)(a) and (3) empowers the National Director of Public Prosecutions (NDPP) to move a trial to the jurisdiction other than the one where the criminal act was committed. Du Toit *et al* state that this section is usually only applied if the NDPP is of the opinion that it is in the interests of justice that multiple criminal acts committed in different jurisdiction areas should be judged during a single trial or if there is a risk of riots.¹⁴

24.5.4.5 In addition section 19 of the **Supreme Court Act**¹⁵ sets out that a Supreme Court will have jurisdiction over all persons residing in or being in its area of jurisdiction in relation to all causes arising and all offences committed within its area of jurisdiction.

24.5.4.6 While the rules on jurisdiction are fairly strict there is a realisation that these rules need to be sufficiently flexible to serve public interest needs. For example, the United Nations framework for model legislation on domestic violence provides that a judicial division will have jurisdiction where-

- (a) the offender resides;
- (b) the victim resides;
- (c) where the violence took place; or
- (d) where the victim is temporarily residing if she has left her residence to avoid further abuse.¹⁶

13 The more detailed provisions on territorial jurisdiction are not relevant and accordingly not discussed here.

14 Du Toit *et al* **Commentary on the Criminal Procedure Act** at 16-5.

15 59 of 1959.

16 For a more detailed discussion see further **Research Paper** on 'Domestic Violence' the South African Law Commission April 1999 at pgs 56-60.

24.5.4.7 The South African Law Commission's **Research Paper** on 'Domestic Violence' makes a crucial point (which is particularly relevant to current law reform), namely that legislation, in order to be effective, must be geared to assist the applicant at all times.¹⁷ The applicant in a domestic violence application is vulnerable and may be equated with the victim or witness to a crime (who may or may not be declared a vulnerable witness), but whom the court has decided should have the use of closed circuit television.

24.5.4.8 The Commission recommends that if a court is of the opinion that a witness should give evidence by way of closed circuit television and there are no closed circuit television facilities available at that court, that court should be able to transfer the criminal proceedings in question to another court with the required facilities. Such a transfer should be done in consultation with the court to which the case is to be transferred. In making an order for a transfer to a court with closed circuit television facilities, the court should take into account the need to protect the person who is to give evidence by means of closed circuit television or similar electronic media from traumatisation; the wishes of the person who is to give evidence by means of closed circuit television or similar electronic media; the wishes of other persons who are to give evidence in the proceedings; the costs of having the proceedings transferred; inconvenience to the complainant in the proceedings; and unreasonable delay that would be brought about by such transfer.

24.5.5 Secondly, the first three criteria are about expediency. These are:

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient.

24.5.5.1 The last two criteria provided for in section 158(3)(d) and (e) empowers the court to order the use of closed circuit television if it appears to the court that it would be in the interest of the security of the State or of public safety or in the interests of justice or the public; or prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings. The Commission is satisfied that the formulation of subsection (e) grants the court a sufficiently wide discretion to provide protection to those witness's who need it. Any limitation on its use in court is a matter for the State prosecutor to

persuade the courts to extend its use. As such **the Commission makes no recommendation in regard to the jurisdictional facts to found the court's discretion.**

24.6 **Implementation difficulties: The need for technical assistance in implementing the closed circuit television system in sexual offence courts.**

24.6.1 Closed circuit television facilities are not available in all courts currently hearing sexual offence trials. In some cases this is due to a lack of operators and facilities, but it is hard to assess the precise extent of the lack of closed circuit television. This is because numerous closed circuit televisions have been ordered, but have not been unpacked. What is required is a plan for implementation and training. **The Commission believes that the development and implementation of such a plan will be most appropriately placed within the sexual offence unit of the National Director of Public Prosecutions and recommends accordingly.**

24.7 **RECOMMENDATIONS**

The Commission recommends as follows:

1. The amendment of section 158 by the insertion after subsection (3) of the following subsections:

(3A) If in criminal proceedings involving the alleged commission of a sexual offence the court is of opinion that it is imperative that a witness or an accused should give evidence by means of closed circuit television or similar electronic media and such facilities are not readily available or obtainable, the court may order that the criminal proceedings should be transferred to another court which has such facilities after the approval of such other court has been obtained.

(3B) When considering whether a transfer as referred to in subsection (3A) should be effected, the court shall take into account -

(a) the need to protect the person who is to give evidence by means of closed circuit television or similar electronic media from traumatisation.

(b) the wishes of the person who is to give evidence by means of closed

circuit television or similar electronic media:

- (c) the wishes of other persons who are to give evidence in the proceedings;**
- (d) the costs of having the proceedings transferred;**
- (e) inconvenience to the complainant in the proceedings; and**
- (f) unreasonable delay that would be brought about by such transfer.**

- 2. The development and implementation of a plan for the training and use of closed circuit television in sexual offence courts be made the responsibility of the sexual offence unit of the National Director of Public Prosecutions.**

CHAPTER 25

USING VIDEOTAPED STATEMENTS AS EVIDENCE IN SEXUAL OFFENCE CASES

25.1 Introduction and current Law

25.1.1 Video testimony of child abuse victims for legal and investigatory purposes has become quite popular over the past few years and is used in criminal proceedings in a number of international jurisdictions.¹

25.1.2 Section 158(2) and (3) of the **Criminal Procedure Act**² provides for the use of closed circuit television to relay a live appearance and examination by the witness. It also provides that evidence may be given by “similar electronic means”. However, as this section does not specifically provide that a video of that examination may be used **at a later date in place of the witness testifying in court**, it cannot be taken to authorise the use of video taped evidence. Videotaping testimony of a witness, whether as evidence in chief or cross-examination, is therefore not an option available in South African law.

25.2. Problem stated

25.2.1 Courtroom testimony is a frightening experience for most victims and child victims in particular. Ways must therefore be found to make this process less traumatising. It is in this context that the idea is mooted (rather than having victims testifying in court) that pre-recorded video recordings of the evidence in-chief of such victims be submitted during trial.

25.3 Comparative analysis³

25.3.1 United Kingdom

25.3.1.1 In 1991 section 32A(3) of the **Criminal Justice Act** introduced provisions by which a videotaped interview with a child witness, conducted by police officers (often together

1 K McFarlane 'Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases' (1985) 40 **University of Miami Law Review** 135 at 150.

2 51 of 1977.

3 This section is drawn substantially from the research compiled for the Commission by Ms Jones under the supervision of Prof C Admay of Duke University, USA.

with social workers) was made admissible at trial as evidence in-chief, subject to the trial judge's statutory discretion to exclude it if the interests of justice required that the recording ought not to be admitted and the child had to attend the formal trial for cross-examination, usually many months later. In addition, there was no statutory provision for an intermediary through whom questions from counsel and the court could be relayed to the child.⁴

25.3.1.2 Section 32A(3) of the 1988 Act was further developed by the **Youth Justice and Criminal Evidence Act** 1999 in terms of which a court may now order what is referred to as "a special measures direction"⁵ if:

- (a) a witness who is under the age of 17 years at the time of the hearing; or
- (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason that the witness suffers from a mental disorder as defined or has a significant impairment of intelligence or social functioning, or that the witness has a physical disability or is suffering from a physical disorder.⁶

25.3.1.3 In terms of section 27 of the 1999 Act a special measures direction may provide for a video recording of an interview with a witness to be admitted as evidence in chief. Section 28 of the same Act provides that when an order is made to admit video recorded evidence in chief, an order may be made for cross-examination of the witness and any re-examination to be recorded by means of a video recording.⁷

25.3.1.4 Section 106J(1a) of the United Kingdom **Evidence Act** regulates the custody of video tapes made in accordance with sections 27 and 28 of the Act. The sections provide that where a judge hears an application to videotape a child's evidence at a pre-trial hearing, the judge has a discretion to make such order as the judge thinks fit concerning the procedure to be followed in taking the evidence at that hearing, the presentation of the recording and the excision of matters from it. Further, an order is to include directions, with or without conditions,

4 L Hoyano 'Special Measures Directions for Child Witnesses' (2000) **University of Oxford Wadham College** at 1.

5 See further Chapter 20 below for a full discussion on the on the position the United Kingdom.

6 Section 16 read with section 23 of the **Youth Justice and Criminal Evidence Act** 1999.

7 Section 28 dealing with pre-recorded cross-examination is not due to come into force until August 2001.

as to the persons or classes of persons who are authorised to have possession of the video recording of the evidence. The order may include directions and conditions as to the giving up of possession and as to the playing, copying or erasing of the recording.

25.3.1.5 Section 106MA of the United Kingdom **Evidence Act** makes it an offence to be in unauthorised possession or dealing in videotaped evidence and carries a fine of £5000,00. A person has authority to possess a video recording of evidence or to supply another person with such video recording only if he or she is expressly authorised by a judge or is a public official whose possession is for a purpose connected with the proceeding for which the recording was made.⁸

25.3.1.6 Section 106MB of the United Kingdom **Evidence Act** makes it an offence to broadcast a video recording of evidence, or any part of it, without the approval of the Supreme Court and is punishable by imprisonment of 12 months or a fine of £100 000,00 or both.

25.3.2 **Australia**

25.3.2.1 The **Queensland Evidence Act** 1977 (as amended) provides in section 21A.(1) for the category of witness known as a “special witness”. Such a witness includes a child under 12 years of age, or a person who, in the court’s opinion, would be disadvantaged due to intellectual impairment or cultural differences or would be likely to suffer severe emotional trauma or to be so intimidated to be disadvantaged. The court may make an order, of its own motion or upon application made by a party to the proceeding, that a videotape of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order. The video is then viewed and heard in the proceeding instead of direct testimony of the special witness.⁹

25.3.2.2 When an order has been made for the videotaping of evidence, any person entitled to examine or cross-examine the special witness must be given reasonable opportunity to view any portion of the videotape of the evidence relevant to the conduct of the examination

8 Sections 106J, 106K and 106M of the United Kingdom **Evidence Act**.

9 Section 21A(2)(e) of the **Queensland Evidence Act** 1977.

or cross-examination.¹⁰

25.3.2.3 The **Evidence Act** 1906 of Western Australia (WA) provides in section 106I(1)(a) that the prosecutor may apply for a court order directing that the evidence in chief of a child complainant under the age of 16 years be taken, in whole or in part, and presented to the court in the form of a videotaped recording of oral evidence given by the child.¹¹ The judge who hears the application may make such orders as the he or she thinks fit, including directions about the procedure to be followed in taking the evidence, the presentation of the recording and the excision of material from it, and the manner in which any subsequent cross-examination or re-examination of the child is to be conducted.¹²

25.3.2.4 Where a child was under 16 years of age at the date of the complaint, the prosecutor may still apply to the court for an order directing that the whole of the child's evidence may be taken at a pre-trial hearing. The accused is to be served with a copy of the application, and is entitled to be heard in the application for the order that the evidence of the complainant who was under 16 years of age at the date of the complaint be videotaped at a pre-trial hearing.¹³

25.3.2.5 Further, the order is to include directions, with or without conditions, as to the person or class of persons who are authorised to have possession of the videotaped recording of the evidence, and may also include directions and conditions as to the giving up of possession and the playing, copying or erasure of the recording.¹⁴ The order may be varied or revoked by the judge who made it, or by a judge who has jurisdiction co-extensive with that judge.¹⁵

25.3.2.6 Western Australia has judicial guidelines for the operation of the special

10 Section 21A(5A) of the **Queensland Evidence Act** 1977.

11 Section 106I(2) of the **Evidence Act 1906** (WA).

12 Section 106J(1) of the **Evidence Act** 1906 (WA).

13 Section 106I(2) of the **Evidence Act** 1906 (WA).

14 Section 106J(1), (1)(a) of the **Evidence Act** 1906 (WA).

15 Section 106J(2) of the **Evidence Act** 1906 (WA).

procedures available for the taking of children's evidence.¹⁶ The judicial guidelines for the use of videotaped evidence note that although each application for the use of the pre-trial hearing facility should be considered on its merits, certain factors should be taken into account. These are:

- (i) The twin aims of the Act which are -
 - (a) to enable the child witnesses who would not otherwise be able to give evidence effectively, or at all, to do so; and
 - (b) to avoid undue trauma to child witnesses arising from such features of the traditional trial process as confrontation with the accused person and the need to tell a distressing story in a daunting public environment.
- (ii) The child's age. Where the child is very young - say, under the age of 8 or 10 years - the court should lean towards allowing the procedure. A very young child may have difficulty in giving evidence in any other way.
- (iii) The length of time likely to elapse before the matter comes to trial. Here the judge needs to take into account the fact that a period of more than 6 months before the trial will, in general, impact more on a very young witness's recall than on a mature person's. In addition, it may be more difficult for a young witness to recover from the traumatic events while the prospect of going to court remains and while he/she is not permitted to discuss the events with anyone.
- (iv) The availability of CCTV facilities to enable the witness to give evidence from a Remote Room.
- (v) Any special circumstances applicable to the case or to the child witness. These may include personal factors (such as intellectual delay or physical or intellectual handicap) and family circumstances, cultural factors which may make it more than usually difficult for the witness to talk in front of people, and evidentiary issues.¹⁷

25.3.2.7 According to the Honourable Judge Kennedy "in almost all sexual offence cases involving child complainants the evidence of the child complainant is recorded on video before trial. This is usually in respect not only of examination in chief, but also of cross-examination and re-examination".¹⁸

25.3.3 Scotland

25.3.3.1 Section 271 of the **Criminal Procedure (Scotland) Act** 1995 contains special provisions for the giving of evidence of children. In terms of subsection (1) the court may

16 Queensland Law Reform Commission 'Evidence of Children and Special Witnesses: Guidelines for the Use of Closed Circuit Television, Videotapes, and the Other Means for the Giving of Evidence' (May 1998) cited in **Report 55** (December 2000) at p 161.

17 Queensland Law Reform Commission **Report 55** at 162.

18 Queensland Law Reform Commission **Report 55** at 163.

appoint a commissioner to take evidence of the child in certain proceedings and it is mandatory that evidence so taken be recorded by video recorder. The accused may only be present in the room where such proceedings are taking place by special leave of the commissioner. However, the accused is entitled to watch and hear the proceedings in a manner determined by the commissioner.¹⁹

25.3.3.2 A court granting an order for videotaping evidence of a child may make such an order after having regard to the possible effect on the child if required to give evidence in the ordinary manner; whether the child will be likely to give better evidence if an order is granted for videotaping the evidence; and the views of the child.²⁰ Further, the court must take into account the age and maturity of the child, the nature of the alleged offence, the nature of the evidence the child is likely to give and the relationship, if any, between the child and the accused.²¹

25.4 Submissions received

25.4.1 Issue Paper 10 posed the question of whether provision should be made for admitting a videotaped record of the child's evidence. An overwhelming number of respondents indicated that they are in favour of videotaping a child's evidence in chief.²²

25.4.2 The **Office of the Attorney General (Transvaal)** expresses the opinion that videotaped evidence in chief should be introduced as an option and cross-examination of the child witness thereafter, in court, should be allowed.

25.4.3 **Advocate R Songca** is also in favour of the capturing of a child's evidence via

19 Section 271(3) of the **Criminal Procedure (Scotland) Act 1995**.

20 Section 271(7)(a)-(c).

21 Section 271 (8) (a)-(d).

22 **Association for the Physically Disabled (Northern Cape); Ms T Madonsela; Johannesburg Child Welfare Society; SAPS Social Work Services Head Office Management; SAPS Provincial Commander Serious Violent Crime KwaZulu Natal; South African National Council for Child and Family Welfare (39 individual responses in favour and none not in favour); Vereniging Child and Family Welfare Society; Vryheid Child and Family Welfare Society; Tshwaranang Legal Advocacy Centre; Provincial Administration Western Cape - Department of Social Services; Association for the Physically Disabled (Eastern Cape).**

a videotape. However, he is of the opinion that the child should only be cross-examined where there are glaring inconsistencies or serious allegations that the child was coached or the allegations are considered to be possibly unfounded. **Ms Madonsela** expresses the view that the child witness should be available for cross-examination after videotaped evidence is accepted only if it is absolutely necessary. Similarly the **Department of Education (Director General)** also believe that the child witness should only be cross-examined if there is doubt about the evidence.

25.4.4 A prosecutor from Veralum, **Ms W L Clark**, makes a thought provoking point in her submission: videotaping evidence in chief is not a real solution for a child witness because the real trauma and damage occurs during cross-examination. On her estimates cross-examination is approximately five times longer than evidence in chief. She also points out that the defence will be quick to make allegations of untoward practices in the making of the video.

25.4.5 The **RP Clinic** is of the view that videotaping the evidence of a child can work if there is adherence to certain procedures that establish the authenticity of both the interview and the tape itself.²³

25.5 Evaluation

25.5.1. Videotaped testimony to be used at trial ?

25.5.1.1 Videotaped testimony of child witnesses offers the potential of using that videotape at trial in place of live testimony. Such an instance would occur where a child is physically ill or severely traumatized from intense questioning and the fear of having to face the accused again.²⁴

25.5.1.2 However, the Commission is aware that videotaping the testimony of the (child) victim will not necessarily prevent the child from being subject to cross-examination.

23 By way of example, the **RP Clinic** refers to a United Kingdom document - the 'Memorandum' (published by the UK Home Office). The Memorandum was published to assist those videotaping an interview with a child witness where the intention is that the result should be acceptable in criminal proceedings in cases involving sexual abuse of a child.

24 McFarlane (1985) 40 **University of Miami Law Review** at 149.

- First, it could happen that the cross-examination of the victim is also recorded. Should such a victim 'fold' under cross-examination, then the accused would need to do no more than present the video at his or her trial in order to secure an acquittal.
- Second, if the victim is not cross-examined at the time of making the video recording of his or her evidence in-chief, such victim will in all likelihood be called for cross-examination by the defence. The pre-recorded video interview would then provide ideal ground for cross-examination especially where there has been a substantial lapse of time since the recording was made. In such a scenario, the victim will in any event suffer the trauma associated with a court appearance and cross-examination. Videotaping the evidence in-chief therefore does not necessarily reduce the number of interviews or prevent cross-examination.
- Third, the manner in and the circumstances under which the video recording was made can also provide fertile ground for cross-examination, trials-within-trials, and more acquittals.

25.5.2 Multiple interviews

25.5.2.1 During investigatory and legal proceedings, children are often forced to undergo multiple, duplicative interviews conducted by a wide range of professionals. Most critics agree that child witnesses should not be exposed to multiple interviews as this serves to increase the child's emotional distress which in turn can prove detrimental to the child's testimony.²⁵ Each interview requires the child to recall experiences that are embarrassing, frightening and may cause further anxiety. To protect themselves from trauma, child victims may learn to distance themselves from the interview process, thus providing a monotonous account of the abuse they have suffered. With each account, the child may lose the spontaneity and immediacy that is usually apparent in the earlier disclosures of the abuse, and their testimony can begin to appear insincere or false.²⁶

25.5.2.2 Multiple interviews can further serve to disadvantage a child's testimony because

25 R Eatman 'Videotaping Interviews with Child Sex Offense Victims,' (1986) 7 **Children's Legal Rights Journal** 13, 14; McFarlane K (1985) 40 **University of Miami Law Review** at 136.

26 MacFarlane (1985) 40 **University of Miami Law Review** at 136.

the more verbal input that a child receives from different adults, the greater the opportunity for the child's testimony to become contaminated by faulty interviewing techniques.²⁷ Videotaping, in theory, may enable professionals involved in the investigatory and therapeutic processes to obtain the information they need by viewing the child's interview tape rather than engaging the child in another interview.²⁸

25.5.2.3 However, the practical difficulties with videotaping testimony and using it in lieu of live testimony in court are numerous. Disclosure is a process, not an event. The question then arises what should be videotaped: the first interview or subsequent interviews? To avoid the chance of capturing an ineffective testimony, legal practitioners are advised not to videotape a child victim's statement at an inappropriate stage.²⁹ An inappropriate stage may be one in which a child victim has just recently disclosed the abuse and is in an exceptionally anxious and frightened state.³⁰ To prevent the capture of ineffective or incomplete testimony which may be given during initial interviews, critics suggest taping the child's third or fourth interview session³¹ on the supposition that by this time the child will have had some time to overcome his or her initial fear or embarrassment, and that he or she will be less contradictory and not as prone to denial.³²

25.5.2.4 Delaying videotaping until a later interview session is further recommended because it is common for some sexually abused children to disclose details of abuse gradually over several sessions.³³ This is due to the fact that even skilled interviewers of sexually abused children may need several sessions to elicit the child's account because abuse is a process and there are numerous social, psychological and environmental factors that may affect a child's

27 Interviewing guidelines can discourage contamination. However, it remains true that the more interviews a child is subjected to, the greater the risk of contamination.

28 MacFarlane (1985) 40 **University of Miami Law Review** at 139-40.

29 MacFarlane (1985) 40 **University of Miami Law Review** at 162.

30 MacFarlane (1985) 40 **University of Miami Law Review** at 162.

31 The third or fourth interview session may not be the appropriate stage at which to videotape a child's testimony. Taking all factors into consideration, the interviewer will have to use his or her educated opinion in determining the best point at which to videotape the child witness.

32 MacFarlane (1985) 40 **University of Miami Law Review** at 162.

33 Eatman 'Videotaping Interviews with Child Sex Offense Victims' (1986) 7 **Children's Legal Rights Journal** 13 at 14.

ability and willingness to divulge the abuse.³⁴ Therefore, videotaping will not necessarily reduce the number of interviews. In this regard a distinction must be made between the recording of interview sessions in the treatment process by therapeutic professionals and the recording, for court purposes, of the evidence in-chief of the victim. Obviously the same considerations will not apply and different procedural issues are involved. In the case of the latter, more formal procedures need to be adopted to ensure that the evidence is not contaminated by posing leading questions, to remove any forms of coercion, etcetera.

25.5.3 Impact of videotaped interview of the complainant

25.5.3.1 The quality of the videotaped account may have a tremendous effect upon trial proceedings.³⁵ Where the quality of the audio or video portion of the tape is poor, it may negatively affect the credibility of the child's testimony.³⁶ Videotaping brings the prosecuting attorney's interviewing technique under strict scrutiny and opens up the door to heightened criticism from the defence and the judge. Having a visual account of the interview process can potentially cause the focus to shift away from what the child said, and onto the manner in which the questions were asked.³⁷ Opponents of videotaping argue that, in relation to a child witness, videotaping undermines the prosecution of child sexual abuse cases by obscuring the child's message and thereby degrading the child's credibility.³⁸ They further argue that prosecution of child sexual abuse cases can be undermined by allowing the capturing of contradictory statements, which occur in the nature of explaining an event, which the defence can use to its advantage.³⁹

25.5.3.2 Police officers, lawyers, medical professional and other evaluators may have a greater incentive to improve their interviewing techniques knowing that they will be captured on tape and open to close scrutiny.⁴⁰ This is because videotaping puts the interviewer on the

34 Eatman (1986) 7 **Children's Legal Rights Journal** 13 at 14.

35 Eatman (1986) 7 **Children's Legal Rights Journal** 13 at 14.

36 LS McGough **Child Witnesses** (1994) 1st ed at 213.

37 J Myers **Legal Issues in Child Abuse and Neglect** (1992) 1st ed at 82.

38 McCough **Child Witnesses** at 214 1st ed. 1994.

39 McCough **Child Witnesses** at 214.

40 Myers **Legal Issues in Child Abuse and Neglect** (1992) at 81.

spotlight, thereby increasing the likelihood that the interviewer will use proper interviewing techniques.

25.5.3.3 Currently, however, South Africa does not have the personal resources with the necessary skills for the Commission to be confident that videotaped interviews will be of a sufficiently high standard which is necessary for the successful conviction of an accused.

25.5.3.4 The simple answer to a lack of skills is to engage in a training process. However, there is currently such a skills shortage in statement taking which requires training before a much more complex process of recording a complainant's experience is introduced.

25.5.3.5 It must be borne in mind that an interview that is either not well conducted or that does not proceed well will not assist the State's case. This concern has been validated by studies in the United Kingdom that have found that videotaping the initial interview has led to a drop in prosecutions being instituted.⁴¹

25.5.3.6 A Child Protection Service Inspectorate Report (1998) found that an application to submit a videotaped interview is now the norm in cases of alleged child sexual abuse, although only 56% of children had their videotapes played at court.⁴²

25.5.4 **Other practical issues**

25.5.4.1 Videotaping can preserve a great deal of evidence that would otherwise be lost and protects against the effect of a child's memory fading over time.⁴³ However, videotaping

41 Aldridge and Wood **Interviewing Children: A Guide for Child Care Workers and Forensic Practitioners** p 10 Home Office United Kingdom. Shortly after the implementation of the **Criminal Justice Act** 1991, which introduced the admissibility of videotaped interviews as evidence in chief (for child witnesses), a survey was conducted by the Association of Chief Police Officers that revealed that nearly 15 000 interviews had been conducted under the Act in its first nine months of operation. However, less than a quarter of the videotaped interviews had been submitted to the Child Protection Services for prosecutions, and only 44 were known to have been played at court. See also Davies GM and Westcott HL quoting Butler A in 'Interviewing the Child Witness under the Memorandum of Good Practice: A Research View' **Police Research Series** Paper 115.

42 See further Davies and Westcott 'Interviewing the Child Witness under the Memorandum of Good Practice: A Research View' **Police Research Series** at p 6.

43 VI Vieth 'In my Neighbours House: A Proposal to Address Child Abuse in Rural America' (1998) 22 **Hamline Law Review** 143 at 165.

of evidence may still not avoid the problem of exposing the child witness to the court process because it may be necessary to clarify issues or raise new points of contention. Should the child be called after videos have been tendered for evidence in-chief and cross-examination, there is real and substantial risk that the child may contradict him or herself due to the lapse of time between videotaping the child's evidence and the court proceedings.

25.5.4.2 Technology is changing from analogue to digital. With this comes the risk that challenges will be made as to the authenticity of videos in digital form as they may easily be manipulated. This problem is not unique to sexual offences and the Commission is of the opinion that it will be more appropriate to await developments in criminal law in general in this regard and to consider introducing this option after that.

25.5.4.3 The Commission deems it proper that at this point in time resources should be allocated to improving basic skills such as effectiveness of specialist interview procedures, general interviewing skills and innovative questioning techniques rather than on video technology when basic skills still need to be developed or improved on. The mastery of these basic skills are the ground-work necessary before effective videotaping of evidence should be considered. Furthermore, the Commission is of the opinion that the subject of videotaping of evidence should be an investigation on its own with extensive consultation on the development of a memorandum to guide interviewers.

25.5.4.4 It is clear from the submissions to Issue Paper 10 that there are existing problems with the technology already in use. For example, closed circuit television is not available in all courts hearing sexual offence cases; in some regions closed circuit televisions have not been unpacked or there are no trained operators. The Commission is of the opinion that the Department of Justice and Constitutional Development should take urgent steps to ensure that the protective measures already provided for in the **Criminal Procedure Act** and the ability to use such measures effectively are properly and professionally implemented.

25.6 Recommendation

- 1. The Commission is not convinced that current circumstances allow for the introduction of pre-recorded videotaped testimony as evidence during the trial. As is clear from the evaluation, victims who have had their testimonies recorded, will in all likelihood have to be cross-examined. Given the other protective**

measures suggested in this Discussion Paper, and the lack of interviewing skills, the Commission is of the opinion that videotaped evidence will not protect victims in South Africa.

2. It is recommended that the Department of Justice and Constitutional Development should take urgent steps to ensure that the protective measures already provided for in the Criminal Procedure Act is properly and professionally implemented.

CHAPTER 26**USE OF AN INTERMEDIARY****26.1 Introduction**

26.1.1 An intermediary is a facilitator through which a child witness can give evidence in criminal proceedings. The intermediary's role is to put the questions from the court, prosecutor, and defence, to the child in language that the child will understand. The child's answers are then interpreted from a child's developmental level to the legalese of the court. This means that the child does not give direct evidence and is not directly cross-examined. This system was introduced following the recognition that "the ordinary adversarial trial procedure is at times insensitive to the needs of the child victim, this is especially so in cases involving child abuse."¹

26.2 Current position

26.2.1 Section 170A of the Criminal Procedure Act 51 of 1977 provides as follows:

(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person such as an intermediary in order to enable such witness to give evidence through the intermediary.

(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place-

(a) which is informally arranged to set the witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any

1 Du Toit *et al* **Commentary on the Criminal Procedure Act** Revision Service 24, 2000 at 22-31.

electronic or other devices, that intermediary as well as that witness during his testimony.

(4)(a) The Minister may by notice in the Gazette determine the persons or category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary who is not in the full time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him as the Minister, with the concurrence of the Minister of Finance determine.

26.2.2 The Minister has determined that the following categories of persons may be appointed as intermediaries:²

- Medical practitioners registered as such and against whose names the speciality pediatrics and/or psychiatry is also registered.
- Family counsellors who are appointed as such³ and who are or were registered as social workers,⁴ or who were classified as teachers in qualification category C to G, as determined by the Department of National Education, or who were registered as clinical, educational or counselling psychologists.⁵
- Child care workers who have successfully completed a two year course in child and youth care approved by the National Association of Child Care Workers and who have four years' experience in child care.
- Social workers who are registered as such and have two years experience in social work.
- Educators in terms of the **Educators' Employment Act** 1994,⁶ who have four years' experience in teaching and who have not at any stage, for whatever reason, been suspended or dismissed from service in teaching. The **Educators' Employment Act** of 1994 was repealed by the **Employment of Educators Act** 78 of 1998 which altered the definition of educator to exclude retired educators. This latter Act has been interpreted to repeal the regulations promulgated by the Minister of Justice in terms of

2 GN R1374 Gazette 15024 of the 30 July 1993 as amended by R360 in GG 17882 of the 28 February 1997.

3 In terms of section 3 of the **Mediation in Certain Divorce Matters Act** 24 of 1987.

4 In terms of section 17 of the **Social Work Act** 110 of 1978.

5 Under the **Medical, Dental and Supplementary Health Service Professions Act** 1974.

6 Proclamation No. 138 of 1994.

section 170(A)(4) of the **Criminal Procedure Act** 51 of 1977.⁷ The result is that retired educators are not qualified to act as intermediaries. However, subsequently there have been legislative developments that attempt to rectify this issue.⁸

- Psychologists who are registered as clinical, educational or counselling psychologists.

26.2.3 Where such an intermediary has been appointed, the court may also direct that electronic and other measures may be employed to ensure that the accused or any other person whose presence may upset the complainant is outside the sight and hearing of the complainant. This allows for the use of systems relying on closed circuit television or one-way mirror screens.⁹

26.3 Submissions

26.3.1 Issue Paper 10 posed the following questions: Is the intermediary system working effectively? Can a child, if old enough, refuse to testify through the intermediary? What are the criteria for appointment and necessary qualifications of the intermediary? Are the relevant regulations in respect of intermediaries effective and appropriate?

26.3.2 Although the majority were in favour of the use of an intermediary¹⁰ it was resoundingly clear that this system is not working effectively.

26.3.3 Some of the reasons cited¹¹ for the non-effectivity of the system are:

- Many courts do not have the system in place, and even in those courts where it is in

7 **S v Frans Bongani** (Case number 20006077). A full bench judgement was delivered on the 13 March 2001 by Judge Conradie of the Cape of Good Hope Provincial Division.

8 See paragraph 26.5.9.2 below.

9 Section 170A (3)(a), (b) and (c).

10 **L Soato, Bloemfontein Child Welfare Society; Ms A Dreyer, H Coertze & I Swart, South African National Council for Child and Family Welfare; H Reyneke, Vryheid Child Welfare Society; Adv Meintjies, Office of the Attorney-General; Johan Brits; W L Clark, Magistrate's Office, Verulam; Rape Crisis (Cape), Women & Human Rights Project (Community Law Centre, UWC and ANC Parliamentary Women's Caucus; Ms A Bezuidenhout, Social Work Services, SAPS; Tshwaranang Legal Advocacy Centre.**

11 **Ms W.L Clark Magistrate's Office, Verulam; Department of Health and Welfare, Mpumalanga Province.**

use, it is frequently beset with practical problems. According to **Dr Renee Potgieter**¹² another reason for the system failing is that although the facility is available, many children are not allowed to use this system. It seems that defence attorneys who oppose the use of intermediaries do so on the grounds that the procedural rights of the accused will be unfairly infringed. Magistrates refuse the application to make use of the system on the same grounds, thereby negating the needs and rights of the child.

- Unavailability of intermediaries. **Ms R Willemse**¹³ reports that non-availability of social workers for appointment as intermediaries leads to postponements of up to two years. She says that these delays have resulted in acquittals as the children could not remember the incident after a period of one and half to two years. **Ms R Willemse and Dr JM Loffell** are of the opinion that the problem is exacerbated by the fact that there is a serious shortage of social workers and that only a few are qualified to act as intermediaries because R1374 20/06/93 prescribes that a social worker can only be appointed if such a person has at least two years experience as a registered social worker in terms of section 17 of the Social Worker's Act of 1978. **Ms Dreyer, H Coertze & I Swart** are also of the opinion that the relevant regulations in respect of intermediaries are not effective or appropriate. In order to bridge the problem **Ms Willemse** suggests that two social workers be appointed to a court on a permanent basis to be utilized as far as assessment of complainants are concerned and to be appointed as intermediaries. When the social workers are at court on a permanent basis, cases could immediately be forwarded to them so that social and psychological services can be provided for complainants where it appears to be essential. **Ms Willemse** further recommends that the regulations be amended to make it possible to appoint social workers and psychologist in private practice as intermediaries, in order to meet the still growing demand.
- Intermediaries do not arrive at court promptly, or sometimes not at all, resulting in delays or postponements, both of which can be distressing to the child.
- A child may not be comfortable with the intermediary chosen, especially if the intermediary belongs to a different race group.
- The criteria for appointment and necessary qualifications for intermediaries are not

12 **RP Clinic, Pretoria.**

13 **Acting Regional Court Magistrate, Benoni.**

appropriate. **Snr Supt JW Booyesen**¹⁴ opines that the present list of persons who can be used as intermediaries must be reviewed. The view is also held that the shortage of intermediaries could be alleviated by using ordinary people who volunteer for the position and have successfully completed a course in communication skills, focussed specifically on being an intermediary.¹⁵ The opinion is also held¹⁶ that the criteria for appointment and necessary qualifications of the intermediary set out in Government Notice 1374 of 30 June 1993, which specifies that all intermediaries should have qualifications in either paediatrics, psychiatry, psychology or practical experience in Child Care or Social Work are on the whole good guidelines and help ensure a certain level of competency and professionalism, though in practice social workers and child care workers are almost exclusively used.

- Prosecutors are also sometimes to blame in that they do not request the services of an intermediary timeously or inform witnesses of their right to use an intermediary.
- Defence lawyers are still given too much leeway in terms of cross-examination of children, and magistrates and prosecutors are not sufficiently trained in limiting such tactics.¹⁷

26.3.4 With regards to skills necessary to act as an intermediary, respondents feel that an intermediary should be trained in play therapy,¹⁸ should undergo a special course at least, if not included in university training,¹⁹ have the ability to deal and communicate with children,²⁰ be experienced in interviewing children, specially trained in child language, psychology and the relevant law with particular emphasis on evidence,²¹ have an understanding of the language

14 **Serious Violent Crime: Kwa-Zulu Natal, SAPS.**

15 **Ms WL Clark, Magistrate's Office, Verulam.**

16 **Ms WL Clark, Magistrate's Office, Verulam.**

17 **Dr JM Loffell, Johannesburg Child Welfare Society.**

18 **Ms C Wagner, Department Welfare and Population Development.**

19 **H Reyneke, Vryheid Child Welfare Society.**

20 **Ms A Dreyer, H Coertze & I Swart, South African National Council for Child and Family Welfare.**

21 **Association for persons with physical disabilities, Northern Cape; Adv Meintjies, Office of the Director of Public Prosecutions, although she is of the opinion that legal training does not seem to be a necessary prerequisite.**

and particular culture of the child,²² should be a person a child feels “safe” with,²³ be a person who has had special training in working with children, be a professional person who has a natural ability to build a positive relationship with the child in a short period of time and interpret, for the court, the child’s responses .²⁴

26.3.5 Despite the inevitable teething problems of the intermediary system, some respondents submitted that the procedure works well and should not be tampered with.²⁵ **Mr Brits** has found it procedurally sound and compatible with the provisions of Chapter Two of the Constitution.²⁶ He sketches the event as follows: an experienced interrogator sits in an adjacent room with only the child witness present. The court proceedings, including questions intended for the child, are communicated to the interrogator via microphones. The court (which of course includes the accused and his or her defence lawyer) hears and sees all that is happening or is said in the adjacent room.

26.3.6 According to Mr Brits this procedure never hampered him during the trials in which he represented the accused and he believes that justice was served in every case. There were cases where the accused were found innocent because of the inability of a child to give a correct account of what happened, but there is no way, in his opinion that, (apart from employing extra terrestrial powers!) the truth could in those cases be established with more certainty. His first submission is that the Commission should accept the procedure that is employed in these special courts as procedurally sound and that it should not be changed.²⁷ The best interest of the children is served and the accused is allowed all the procedural rights that the authors of the Constitution envisaged. He further submits that at the present stage in the development of our law, the employment of s 170A does provide sufficient protection provided that the use is not extended to instances of assault where it involves less serious but continuous sexual assault of adults upon children and in those cases that involve apparent

22 **The National Council for persons with physical disabilities in South Africa.**

23 **Sr Potter, Agape School for the Cerebral Palsied.**

24 **Dr Renee Potgieter, RP Clinic, Pretoria.**

25 **Johan Brits.**

26 Act No 108 of 1996.

27 Mr Brits further submits that the Department of Justice should provide more funds so that the equipment used in the special courts can be upgraded.

sexual assault but which are found not to be as serious as to necessitate criminal court procedures under the circumstances.

26.3.7 **Ms WL Clark** similarly submits that if a child is old enough he or she should be able to decide whether or not to use an intermediary.²⁸ She has encountered cases where older children feel that to insist on using the intermediary is treating them as “babies” and this makes them indignant and resentful. In her opinion these children’s preferences should be considered. A possible solution suggested by **Ms Clark** would be to make the use of intermediary compulsory for under 12’s and optional for the 12 - 18 age group. Naturally the prosecutor should discuss the advantages and disadvantages of the intermediary system with the older child so that he or she can make an informed choice.

26.3.8 **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC and ANC Parliamentary Women’s Caucus** point out that the fact that public prosecutors often fail to inform witnesses of the availability of measures provided for under section 170A undermines the effectiveness of these sections. Although it is recognized that the decision whether to make an application for these special measures lies with the prosecutor, (and the court ultimately has a discretion whether to allow the application of the special measures), a duty should be placed on prosecutors to inform witnesses of the potential availability of these procedures and to provide reasons for decisions not to make an application under section 170A.

26.3.9 **Rita Blumrick, Office of the Director of Public Prosecutions, Pietermaritzburg** holds the view that the introduction of the intermediary system is an indication that it is recognized that children, because of vulnerability and youthfulness, need to be treated differently from adults in order to give them an equal opportunity before court. **Rape Crisis (Cape Town), Women & Human Rights Project (Community Law Centre, UWC and ANC Parliamentary Women’s Caucus**, however, state that all witnesses, irrespective of age, should be entitled to this protective measure. In their opinion section 170A, for example, appears to refer to biological or chronological age only, which severely prejudices those mentally disabled victims who have a “cognitive age” lower than 18 years, and would therefore benefit from the appointment of an intermediary.

28 Dr R Potgieter endorses this view and says that a child should be introduced to all his options.

26.3.10 In contrast to the almost blanket support given to the intermediary system, **Mr N Van Dokkum** submits that the adversarial nature of the proceedings is retained in that the intermediary is not an independent player and his or her rephrasing of the questions must retain the purport of the original question and in addition the rephrasing is always subject to objection by either counsel and the power of the judicial officer to order the intermediary to put the question in its original form.

26.3.11 He states however, that in England and America where similar methods have been used, prosecutors have often complained that their case loses a lot of impact in not having the child in the court to be observed and that it is difficult to empathise with and sympathise for a child who is removed and therefore remote. He suggests that the wording of the present Act is sufficiently wide to allow the accused to sit in the isolated room and view proceedings whilst the child gives its evidence in open court. This would obviously involve some technological modifications as the present isolation rooms are geared to transmit evidence out with the only link (or evidence in) being through the intermediary's headset. Subject to financial constraint, (and it must be noted that the vast majority of courts in South Africa do not have the video-link facility) this modification might be worth pursuing.

26.3.12 **Ms E Dürr Fitschen** of the Wynberg sexual offences court raised the problem that at courts where there is not a full-time social worker to co-ordinate intermediaries, service to the public is hampered as the arrangements for an intermediary to be at court are not made timeously, with the result that children then often have to give evidence in open court. She goes on to analyse the section pointing out that the section makes provision for the prosecutor to bring an application for the appointment of an intermediary. If the prosecutor fails to bring such an application (due to a lack of sympathy, experience or insight) the child cannot object or appeal the decision not to apply for the appointment of an intermediary. She recommends that the decision to bring such an application should not be the sole decision of the prosecutor, but should be made in conjunction with a social worker or psychologist. She points out that prosecutors frequently misjudge the factors that indicate the need for an intermediary. For example, the age of the child, how calm the child was during the consultation, if the child herself/himself says that they are scared, etcetera. These factors are often misleading as they *inter alia*, do not take into account the child's defence mechanisms, masked depression and anxiety. She recommends that section 170A should be amended so that an intermediary is appointed in all cases where a witness is under the age of 18 years of age.

26.3.13 **Ms E Dürr Fitschen** also requests that consideration be given to the possibility of extending the protection afforded by section 170A to witnesses over the age of 18 years.²⁹

26.3.14 There are varying responses to the suggestion, by **Ms Dürr Fitschen**, that the appointment of intermediaries should be mandatory for a witness under 18 years of age. The responses are as follows:

- A few justice officials are in favour of the proposed amendment. Although in favour of the system, **Adv Meintjies** proposes that the child must be able to waive such right to testify through an intermediary and that it is the magistrate's duty only to ensure that such waiver is in fact what the child desires. In her opinion the intermediary to be appointed should preferably be a person the child is already acquainted with and section 170A should provide likewise. It should expressly be allowed that a person the child wants to accompany him/her, also be present.
- Similarly **Dr d'Oliveira**³⁰ is of the opinion the appointment of an intermediary for a child under 18 years of age should be mandatory and should be introduced immediately. **Dr d'Oliveira** refers to the report to the Steering Committee of the NPA by the Justice Sectoral group which identified that section 170A should be amended in this fashion. He argues that in practice the request on behalf of the State to appoint an intermediary is counter-productive and time consuming as it causes delays and unnecessary adjournments. Further, that it is undesirable for the court to have a discretion in this regard as the practical implication is that a child witness may make use of an intermediary and a closed circuit camera in court A. Whereas the same child witness, if he or she were to appear before the magistrate of court B, may not be allowed the same assistance if the magistrate is of the opinion that it is not necessary. This imbalance runs counter to the idea of justice and equality.
- **K H Bosch**³¹ supports the suggested amendment and makes the point that the procedure requiring an application for the appointment of an intermediary delays court proceedings and the fact that the party bringing the application should put forward expert evidence to enable the court to make the correct decision. Further, that it can be accepted that the majority of children will be exposed to undue mental emotional

29 She points to the fact that this not the first time that this request has been raised and as yet no change has been made to the law in this regard.

30 Of the Office of the attorney General Transvaal.

31 Magistrate(Pretoria).

suffering if they give evidence in the ordinary manner in open court.

- **A P de Vries**³² disagrees with **Ms E Dürr Fitschen** and argues that one of the only reasons that the full bench of the Eastern Cape Division in **K v The Regional Court Magistrate NO and others**³³ found section 170A not to be unconstitutional was due to the discretion given to the trial court.
- Numerous prosecutors and magistrates point out that a witness may prefer not to be assisted by an intermediary. There may be cases where the prosecutor prefers not to lead evidence of a person under 18 years through an intermediary or where it is not necessary as the child is able to give evidence unassisted. In this respect reference is made to the experience of the prosecutor in being able to assess the ability of the witness.³⁴
- Other prosecutors and magistrates are of the opinion that the mandatory appointment of an intermediary is unpractical. It will increase the costs of prosecuting such cases, the use of an intermediary causes delay which will be to the detriment of both the child victim and the criminal justice process by further congesting the court rolls.³⁵
- Concerns are also raised that the exclusion of the court's discretion to determine whether an intermediary should be appointed may impact on the accused's rights to cross-examination.³⁶

32 Of the Office of the Attorney General, Witwatersrand Local Division.

33 1996(1) SACR 231 E.

34 **C F Du Plessis (Northern Cape); M T van der Merwe SC (Attorney General Free State); L J Roberts (Attorney General Eastern Cape); F W Kahn SC; Ms Blumrick (KwaZulu Natal); W P Nwl (Wonderboom Magistrate's Court); M F Davids Snr Public Prosecutor Wynberg and L Myburgh Control Prosecutor Training (Wynberg) and M Greyvenstein (Wynberg); Regional Magistrates Germiston; J J De W Saaiman Acting Regional Representative Justice; Magistrate Zwelitsha; L J Langeveld Bisho; Regional Representative for Justice Thohoyando; Chief Magistrate (Johannesburg).**

35 **Ms R Blumrick (KwaZulu Natal); L J Roberts (Eastern Cape); J H Bekker (Acting Regional Court President (Pretoria); E T Engelbrecht Regional Court President (Kimberely); A J Voogt Regional Magistrate (Pietermaritzburg); P J Theron Chief Magistrate (Randburg); K H Bosch Magistrate (Pretoria); W L Clark; Regional Magistrates Germiston; Head Justice Planning Division (Ulundi) ; Magistrate Zwelitsha; Regional Representative for Justice Thohoyando.**

36 **Ms R Blumrick (Kwa-Zulu Natal); C F Du Plessis (Northern Cape); G Steyn and P Campbell Regional Magistrates (Port Elizabeth); Regional Court President (Cape Town); L J van der Schyff Regional Court Magistrate and L J Brink and Regional Court Magistrates (Johannesburg); C J Eksteen Regional Court President (Johannesburg); W P Nel Magistrate (Wonderboom); T J Raulinga Magistrate (Bloemfontein); Chief Magistrate (Johannesburg); L J Langeveld Acting attorney General (Bisho).**

- The **Chief Magistrate (Mdantsane)** is of the opinion that the court's discretion to appoint an intermediary should be retained, but should be restricted by dropping the age of a witness from 18 to 14 for which an intermediary may be appointed.

26.3.15 In response to a further question posed in Issue Paper 10 as to whether the use of measures to shield the child witness from the accused should be dependent upon the court exercising its discretion to appoint an intermediary, the majority of respondents were of the opinion that this should not be the case.³⁷ Some are of the opinion that such additional measures should be automatically available to a victim.³⁸

26.3.16 **Dr Renee Potgieter**³⁹ refers to recent research done by Dr Amanda Wade at the University of Leeds which shows very clearly that children of 8 to 18 years have a need and are capable of making their own choices as to whether they want to testify in court, or make use of another system where they can be shielded from the accused or from open court proceedings. She points out that it is of the utmost importance that the child's wish to testify in this way should outweigh all other factors – the defendant should not be allowed to ask for the contrary and the magistrates should not have jurisdiction over this.

26.3.17 If a child wishes to testify in an open court, his or her wish as to who should be present in court, should be respected as far as possible. However, the choice of whether the child should testify in an open court, or through an intermediary, or the extent to which the child wishes to be shielded from the accused, should be the sole prerogative of the child, as it is the child who is going to testify and is going to have to cope with the stress of testifying and being cross-questioned. Where any doubt exists about the child's wish to testify in an open court, or where there is reason to believe that the child was coaxed or coerced into a specific choice, the matter should be assessed by a psychologist or forensic social worker specializing in the field of child sexual abuse, whose recommendation should be final and accepted by court.

37 **Association for persons with physical disabilities, Northern Cape; Ms A Bezuidenhout, Social Work Services, SAPS; Ms A Dreyer, H Coertze & I Swart, South African National Council for Child and Family Welfare; Tshwaranang Legal Advocacy Centre.**

38 **Sr Potter, Agape School for the Cerebral Palsied; Supt N Nilsson, SAPS Youth Desk, Western Cape.**

39 **RP Clinic, Pretoria.**

26.3.18 The fact that the accused also has the right to have a “say”⁴⁰ in the matter as to whether “protective measures” are used to shield the witness, is in the opinion of **Ms W.L. Clark**⁴¹ an undesirable state of affairs as ultimately the decision will lie with the magistrate and if he/she is unsympathetic to the child’s needs, great harm can result.

26.3.19 Further, information from intermediaries themselves has been fed into the sexual offences investigation via data gathered by Professor Rose September as a result of a workshop held with 25 intermediaries and seven follow-up interviews with individual intermediaries.⁴² The information was gathered pertaining to their perceptions of the role, training and concerns relating to intermediaries.

26.3.20 (i) **Perceptions about their roles**

26.3.21 A wide range of perceptions and interpretations about their roles exist. In general, the intermediaries saw their role primarily as one of protecting the child from the “abuses” of the court and making sure that “justice” is done. The following themes summarize their perceptions of their roles: to help children to communicate their feelings and understanding of what has happened; to help the court to communicate in “ordinary” language with the child; to ensure objectivity; to help children to understand the court process and to determine the mental state of the child. One respondent said that intermediation is a “system of communication between the child and the court room”. The variation in their responses highlights the need to clarify the role of the intermediary, because such diversity of opinions could have profound consequences for children and for the court process including decision-making and sentencing.

26.3.22 (ii) **Training**

26.3.23 No selection criteria exist (other than stipulated in the regulations relating to their particular professions) for the recruitment or appointment of intermediaries.

- Some report that they received crisis management training prior to the establishment

40 **S v Mathebula** 1996 (2) SACR 231.

41 **Magistrate’s Court, Verulam.**

42 Professor R September **The Development of a Protocol for the Management of Child Abuse and Neglect** at p 182- 186 University of the Western Cape 1998.

of the sexual offence courts.

- One person had received a one week training course at the Justice College in Pretoria.
- In addition, all reported that they were trained at one of three training workshops presented by the Victim Support Service Co-ordinators. Topics covered in the training included an overview of the legal process and legislation; the legal position of the child; understanding and interpreting the child's perceptions and language; child development; the dynamics of child abuse; and the qualifications and role of intermediaries. All the respondents indicated that the training was inadequate and limited and did not prepare them for what was and what is expected of them in the court.
- Thus, they wanted lengthier, more in-depth coverage of legal procedures, and understanding and interpreting the child's language and emotions.

26.3.24 (iii) **Key findings**

26.3.25 The intermediaries expressed concern that the legal professionals displayed little or no understanding or consideration for the contributions made by social workers. This complaint was a recurring theme in their responses. In addition it was felt that prosecutors and magistrates often lack knowledge of basic child developmental needs. Therefore, members of both groups often make demands that children cannot meet. Failure on the part of children to comply with these demands often have negative consequences for the children, for example their cases could be dismissed.

26.3.26 The long hours that children are expected to attend proceedings evoked strong feelings from the intermediaries. One observed that this expectation "indicates a profound lack of understanding about psychological issues and about levels of maturity and mental ability". A general feeling of dissatisfaction about the preparation that children receive prior to court proceedings, was also expressed. It was also strongly recommended that magistrates should not rotate, i.e. change from hearing to hearing as often as they currently do. The intermediaries interviewed felt that rotation requires children to "adapt" to a new person every time. This happens frequently because many cases are remanded for two and more times. Multiple remands or postponements of cases were seen to heighten the negative effect of prolonged proceedings on children and families.

26.4 **Comparative Analysis**

26.4.1 **United Kingdom.**

26.4.1.1 Section 29 of the **Youth Justice and Criminal Evidence Act** 1999 provides that as a special measure, any examination of any witness (however and wherever conducted) may be conducted through an interpreter or other person approved by the court for the purposes of this section (“an intermediary”).

26.4.1.2 The function of the intermediary is to communicate to the witness questions put to the witness, and to communicate the answers given by the witness to any person asking such questions. In doing so the intermediary may explain such questions or answers so far as is necessary to enable them to be understood.⁴³

26.4.1.3 The presiding officer and at least one legal representative for both the prosecution and the defence must be able to see and hear the witness giving evidence and be able to communicate with the intermediary.⁴⁴

26.4.1.4 The intermediary will usually be a specialist, through training or due to unique knowledge of the witness, who can help a witness who has difficulty understanding questions or framing evidence coherently to communicate. Alternatively, an intermediary may have skills to overcome specific communication problems, for example, deafness.⁴⁵

26.4.2 **Western Australia**

26.4.2.1 The **Evidence Act** 1906 of Western Australia provides in section 106F that where a child under the age of 16 years is to give evidence in any proceeding in a court, the court may appoint a person that it considers suitable and competent to act as a communicator to the child. The function of the communicator is, if requested by the judge, to communicate and explain the questions put to the child and likewise to communicate to the court the evidence given by the child.

43 Section 29(2).

44 Section 29(3)(a).

45 A deaf witness could also apply for an interpreter or communication aid under the Act's provisions. See further Explanatory notes **Youth Justice and Criminal Evidence Act** 1999 at p 21.

26.4.2.2 This Act also provides that it is a criminal offence to, while performing a duty in terms of the above section, wilfully make any false or misleading statement.⁴⁶

26.4.3 **Belgium**

26.4.3.1 Following a Belgian Parliamentary Commission regarding sexual abuse legislation was enacted in 1995 to provide that a psychologist may be present during hearings in cases of sexual abuse of minors. The rationale of being assisted by a psychologist is briefly:

- to de-stress the child by preparing him or her to the hearing and after it, to de-brief him or her;
- to evaluate the credibility of the testimony;
- after the hearing the psychologist will proceed to do a psychological examination of the child in order to evaluate the hearing in its context. The psychologist is not allowed to question the child directly about the facts, but is allowed to suggest or to propose certain interpretations of the testimony or the behaviour of the child.⁴⁷

26.5 **Evaluation**

26.5.1 **Constitutionality.**

26.5.1.1 On evaluating the constitutionality of section 170A of the Criminal Procedure Act, a question to be addressed is whether or not this section infringes the accused's right to a fair trial. The aspect of the right to a fair trial in question here would be the right to adduce and challenge evidence. This right is entrenched in the 1996 Constitution as sections 35(3)(e) and 35(3)(i) respectively.

26.5.1.2 In the case of **Klink v Regional Court Magistrate NO and Others**⁴⁸ a constitutional challenge was made to section 170A on the basis that this section deprived the accused of his right to a fair trial and limited his right to cross-examine state witnesses. While

46 Section 106F(4).

47 Paper presented at the Second Annual Conference and General Meeting of the International Association of Prosecutors, 1997 by Isabelle Van Heers, Belgium, entitled **Sexual Abuse of Children: Situation in Belgium in 1997.**

48 1996 (3) BCLR 402 (E).

the court (*per* Melunsky J) recognised the right to confront and cross-examine as part of a fair trial, it was held that it was still necessary to balance the rights of the accused with the rights of witnesses not to be subjected to further traumatising events in their pursuance of justice.⁴⁹

26.5.1.3 It is significant that Melunsky J found that constitutional interpretation required more than an attempt to ascertain the intention of the legislature from the language used. He held that constitutional questions ‘must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis’.⁵⁰ The learned judge then added that section 170A should be considered in this light and emphasised that -

Nothing in this section precludes an accused from representing himself or from having the right to legal counsel. Nor is an accused person, either personally or where represented through Counsel, prevented from asking questions in cross-examination. When the section is applied, the cross-examiner’s questions are put to the witness by the intermediary. This does not appear to me to be a limitation of the right to cross-examine.⁵¹

26.5.1.4 As a result, the court concluded that the provision did not deny the accused a right to a fair trial. Even if one were to give a broad and liberal interpretation to the fundamental rights of the accused to a fair trial, the court was satisfied that the right to cross-examine had not been violated by the provisions of section 170A of the Act.⁶

26.5.2 Use of experts

26.5.2.1 Since the courts lack expert knowledge in regard to social science issues, it may be necessary to enable the court, the prosecution, the accused or the witness concerned to call an expert to advise the court as to whether there is a need for a witness to give evidence with the assistance of an intermediary. This need is aptly illustrated by the Cape Provincial Division

49 Steytler points out that the test applied by the Court in the **Klink** judgement (i.e. the balancing of interests between the accused and the child witness) is essentially ‘a limitation enquiry’. This step usually follows after a finding that a right has in fact been violated in order to establish whether this violation is reasonable and justifiable. The court’s conclusion that the right to cross-examination is not limited is therefore at odds with this limitation enquiry.

50 At 411 F - H.

51 At 411 H - I.

case of **S v Stefaans**.⁵² In this case the prosecutor in the trial court had been informed that the complainant was afraid of the accused and would feel more confident to give evidence through an intermediary. A report by a social worker contained a similar recommendation, and the court *a quo* had accordingly granted the application for appointment of an intermediary.

26.5.2.2 On appeal, the High Court held that the criterion that the witness would be 'exposed to undue mental stress or suffering' had not been satisfied. It held that the term 'undue mental stress' (*'onredelike geestespanning'*) connoted a degree of stress greater than the ordinary stress which witnesses, including witnesses in rape cases, may experience. The likelihood of such 'undue mental stress' had not been demonstrated adequately, which implied that the intermediary should not have been appointed. The Court set out certain guidelines for the application of section 170A. These guidelines include -

- that a court should be mindful of the dangers inherent in the use of an intermediary...as it is easier to lie behind someone's back.
- that the giving of evidence is inevitably stressful and therefore a judicial officer should be satisfied that "undue stress" will result as will no doubt be the case with younger or more immature witnesses.
- that a witness who is known to the accused and who knows the accused is less likely to be unduly stressed by the need to testify before the accused than one who is unknown to the accused.

26.5.2.3 In the case under discussion, it appeared that the complainant and the accused lived in the same community and saw each other frequently. For this reason the court found that there seemed to be no basis upon which fear of victimisation could be said to have played a role in the decision.⁵³

26.5.2.4 It is in regard to the last assessment by the court that expert input would have been particularly useful as evidence suggests precisely the opposite; namely that a known offender from the same community may be extremely frightening to testify before and witness

52 1999(1) SACR 182 (C).

53 At 189.

intimidation is a major problem.⁵⁴ **The Commission has come to the conclusion that it is important that the court be empowered to call for expert input in this regard and recommends that the court may *mero motu* , or on the request of the prosecution or the witness concerned, call for expert input into the question of whether it is necessary, beneficial or appropriate to appoint an intermediary to assist the relevant witness.** This recommendation is developed in Chapter 20 above.

26.5.2.5 In the case of **Stefaans** (referred to above), the conviction was set aside as the trial of the appellant was held not to have been procedurally fair, due to the fact that the trial court's appointment of an intermediary (in terms of section 170A) had not been warranted.

26.5.3 Discretion

26.5.3.1 Section 170A of the **Criminal Procedure Act**⁵⁵ is currently formulated so that the court has a discretion to order the use of an intermediary when the witness is under eighteen years of age and that it would expose such a witness to 'undue mental stress or suffering' if he testifies at such proceedings.

26.5.3.2 The Project Committee recognises that a court's discretion may have a roll to play, but are aware of the problems such discretion may create for a young witness if the court is unable to appreciate the child's experience of the offence and of testifying unassisted in court.

26.5.3.3 The enormous potential for damage to the young witness is illustrated by a case in heard in the High Court in Kwa Zulu Natal before Judge Hugo.⁵⁶ The facts of this case are as follows: the accused had allegedly murdered the mother of the only eye witness (a young girl seven years of age). The accused was known to the child witness. An intermediary was requested to assist the child witness. This request was refused by the court on the basis that whatever the child had to say could be said to the court. The child witness was so frightened that she was unable to give any evidence and the accused was accordingly acquitted. The

54 Project Committee members Ms J van Niekerk of Childline Kwa Zulu Natal and Professor R September of the University of the Western Cape attest to this fact.

55 51 of 1977.

56 **S v Bongani Samuel Mngoma** Case Ref D 168/99.

social worker dealing with the child after the trial indicated that the child is now further traumatised by her inability to tell the court what happened and her response after leaving court was simply to say that the court “was full of white people”.⁵⁷ It is submitted that the broad discretion, without any guidelines, contained in section 170A in the **Criminal Procedure Act** to interpret ‘undue mental stress or suffering’, permit judicial interpretation which frustrates the very purpose of this section.

26.5.3.4 The Commission is of the opinion that an intermediary should automatically be provided for the child witness in criminal proceedings involving a sexual offence, unless the court has reason to believe that exceptional circumstances exist that justify not appointing an intermediary for a particular child witness in which case reasons should be given for the refusal to appoint an intermediary. In the vast majority of cases the child witness will benefit from the use of an appropriately trained and skilled intermediary. Such automatic provision of an intermediary will save court time and resources by avoiding unnecessary enquiries as to whether the child witness will be exposed to ‘undue mental stress or suffering’ if he or she testifies in such proceedings. It should, however, be subject to the proviso that the child (if he or she is over the age of 10 years), may after careful explanation, choose otherwise.

26.5.3.5 **The Commission recommends that an intermediary should automatically be provided for a child witness in criminal proceedings involving a sexual offence unless exceptional circumstances exist that justify not appointing an intermediary in which case such circumstances must be specified by the court.**⁵⁸

26.5.4 **Should intermediaries only be available to assist child witnesses?**

26.5.4.1 Currently only witnesses under eighteen years of age are entitled to the use of an intermediary. This Discussion Paper argues for the introduction of a category of witnesses to be known as ‘vulnerable witnesses’. Vulnerable witnesses will have to satisfy different criteria from that set out in the **Criminal Procedure Act**.⁵⁹ The question thus arises whether an adult witness who is declared vulnerable should be able to be assisted by an intermediary.

57 Social worker Childline Kwa Zulu Natal as advised by Ms J van Niekerk of Childline Kwa Zulu Natal

58 See Chapter 20 above..

59 51 of 1977.

26.5.4.2 **The Commission is of the opinion that there may well be cases where a vulnerable adult witness should be assisted by an intermediary and accordingly recommends so.** The criteria by which such assessment should be made are set out in Chapter 20 above on vulnerable witnesses.

26.5.5 **Availability of intermediary system**

26.5.5.1 An important factor brought to the attention of the Commission through submissions to the Issue Paper is that the system of intermediaries is not uniformly available throughout South Africa. The Commission is of the opinion that the role of intermediaries in cases of sexual offences is crucial and that **the Departments of Justice and Constitutional Development should be tasked to ensure the availability of intermediaries to all courts hearing sexual offence cases, as soon as is practicably possible. Such implementation must take into account adequate training for intermediaries if there is a lack of expertise and experience.**

26.5.5.2 Furthermore, if the recommendation that all victims of sexual offences who are minors shall have an intermediary appointed to assist them is accepted, there will be a huge demand for intermediaries. **As such the Commission proposes that these recommendations should be phased in and said Departments develop a timetable for selection, training and appointment of intermediaries on a permanent basis. Furthermore, that the Minister of Constitutional Development and Justice should report annually to Parliament on the level of implementation until such time as the intermediary system is fully in place.**

26.5.6 **Role Confusion of Intermediaries**

26.5.6.1 There is confusion among intermediaries as to their precise role in court.⁶⁰ The only indication in subsection 170A(2)(b) of what is expected of intermediaries in court is that of conveying the general purport of questions to the relevant witness. Intermediaries report that it is apparent that the court and the legal representatives have very little knowledge of childhood development and as a result hold unrealistic expectations of the child witness. In effect the

60 This is based on the workshops and consultations held with intermediaries by Professor Rose September of the University of the Western Cape.

child witness's responses are in many cases judged by persons who have little or no knowledge of childhood development on the physical needs of the child giving evidence. Yet the intermediary is in court sitting next to the child and has experience or training in this regard.⁶¹ After consideration the Commission concludes that it is appropriate that the court should be able to draw on the knowledge and experience that an intermediary brings to court. **As such it is recommended that the intermediary, as a facilitator, should be in a position to convey to the court that the witness is tired, fatigued or stressed and request a recess.**

26.5.7 Practical Problems

26.5.7.1 Even in courts where the intermediary system is available, intermediaries are not requested timeously by prosecutors, or the intermediary is elsewhere engaged or does not attend court on time. The Commission regards such administrative problems seriously and recommends that this problem be overcome by introducing regulations to the proposed new subsections to section 170A to the effect that **should an intermediary not be available, the prosecutor and the intermediary (if the latter has been appointed) should explain to the court the reasons for the failure to appear. Where the intermediary has been subpoenaed, as should be the case, failure to appear in court will entitle the presiding officer to issue a warrant of arrest for that intermediary.**

26.5.8 Cross-examination too harsh

26.5.8.1 Intermediaries have requested the Commission to consider the issue of too great a leeway being given to defence lawyers and counsel in court in cross-examining a child complainant. This issue is covered in the chapter dealing with cross-examination.

26.5.9 Lack of persons to be appointed as intermediaries

26.5.9.1 A further problem is the general lack of available persons to be appointed as intermediaries. This is put down to the (low) day fee payable to intermediaries and the small pool of available intermediaries. In the absence of an accrediting body which can hold

61 On the other hand, presiding officers, prosecutors and defence lawyers often ride roughshod over intermediaries because of their lack of training or experience in court procedure, the law of evidence, and criminal law in general.

intermediaries professionally accountable, the regulations provide that only certain professionals can be appointed as intermediaries. Accountability of intermediaries is therefore assured in a round about way. Misconduct by a particular professional acting as an intermediary exposes that professional to the disciplinary procedures of that professional body (for example, the Medical and Dental Council), etcetera. Realistically, before medical practitioners and some psychologists or even social workers in private practice start queuing for positions as intermediaries, the current fee structure for intermediaries will have to improve dramatically. The low fees limit the pool of prospective intermediaries effectively to social workers, child and youth care workers and educators. The availability of intermediaries dramatically affects access to justice. This problem may be resolved by the proposed amendment to the regulations which will allow **retired** educators to act as intermediaries.⁶²

26.5.9.2 The issue of the use of retired teachers as intermediaries was recently the subject of a full bench decision of the Cape of Good Hope Provincial Division. In that case, **S v Frans Bongani**,⁶³ the court, per Conradie J held that retired educators are not qualified to act as intermediaries in terms of section 170A of the **Criminal Procedure Act**,⁶⁴ together with the regulations.⁶⁵

26.5.9.3 As a result of this judgement the Department of Justice and Constitutional Development has drafted an amendment to the regulations to put it beyond doubt that retired educators are competent to be appointed as intermediaries. However, given that retired educators are not subject to any form of professional discipline, the Commission is of the opinion that the time has perhaps arrived for intermediaries to be recognised as professionals, that only persons accredited by a professional body be allowed to act as an intermediary, that certain training courses be prescribed, etcetera. The Commission would prefer to adopt this route (i.e. formalising the intermediary profession) rather than tinker with the current

62 These regulations have been drafted and are to be passed and be implemented on the 2 July 2001.

63 Case number 20006077. Judgement handed down on the 13 March 2001.

64 51 of 1977.

65 Government Notice R. 597 of the 2 July 2001 provides for certain amendments to the persons or categories or classes of persons who are competent to be appointed as intermediaries which were determined by Government Notice R 1374 of 30 July 1993 and amended by Government Notice R 360 of 28 February 1997. Government Notice R.597 of the 2 July 2001 includes educators in terms of the **Educators Employment Act** 1994 which includes retired teachers.

regulations. This possibility will be referred to the secondary legislation section in the Department of Justice and Constitutional Development as they are planning a complete re-assessment of the regulations to section 170A.

26.5.9.4 Furthermore, legislation was passed on the 20 June 2001 which provides for the validating of evidence, led by retired educators who have been appointed as intermediaries, in part heard matters or where judgement has not been delivered.⁶⁶

26.5.10 **Who should be appointed to act as an intermediary**

26.5.10.1 A further issue is who should be appointed as an intermediary. This involves an assessment of who is competent to assist the child witness to give evidence in court. Currently the Minister of Justice and Constitutional Development determines who can be appointed as an intermediary by regulation. There are a number of thoughts on this issue. There are those who hold that any person should be able to be appointed, while others require that the person be a social worker or have experience in dealing with children. Yet again others hold that lay persons working in counselling environments frequently have more experience than many psychiatrists in working with traumatised children. We have already expressed our opinion on the need to professionalise the intermediary (see the previous paragraph) and leave the matter there.

26.5.10.2 A related issue is the enquiry by the court to determine competence of a person to be appointed as an intermediary. This issue was raised at a workshop on preparing the child witness for court. All those present agreed that to use the term "competent" and leave this assessment to the magistrate or even the prosecutor or both in consultation with each other would be inadequate. Numerous examples were cited of interpreters and clerks of court being called to give evidence on issues in the juvenile court that they were patently inexpert on, but the magistrate in the court wanted to process a juvenile quickly and "not be bothered" with calling an expert on the issue. A concern was noted that if the magistrate were left to define and assess competence for the sake of convenience, the prosecutor and magistrate would be content with allowing interpreters/etc to act in the role of intermediary.

26.5.10.3 It was felt that the intermediary must be able to cite - and if necessary

66 See further section 170A (5) of the **Criminal Procedure Amendment Act** 2001.

authenticate - practice experience with the age group of the witness before the court. One problem with the present system is the use of intermediaries - eg a high school teacher - who may be used to assist with the evidence of a six year old and yet have no practice experience with this particular age group. Communicating with and facilitating the communication of a six year old requires a vastly different set of skills and knowledge than those required for communication with a young teenager.

26.5.10.4 Determining competence is a difficult issue. There are two possible ways to proceed to assess competence:

- Either at the time of being appointed by the court as an intermediary in a particular case; or
- Through a process prior to appointment to a specific case, but after the person has satisfied the requirement of falling within one of the categories determined by the Minister of Justice and Constitutional Development, by way of regulation, of who may be appointed as intermediaries in terms of section 170A(4)(a); alternatively, after going through an accreditation process.

26.5.10.5 The second option implies establishing cross sectoral selection, a process of selection and possibly registration as an intermediary. If the latter approach is followed it will not be necessary for the court to assess competence as prior selection and registration will guarantee competence. This option has the advantage of avoiding delays in court.

26.5.10.6 Whatever option is selected, both will require determining competence. The Commission favours the second option as it will not detract the already overburdened courts from their core function of hearing criminal cases. Further, the Project Committee proposes that the following criteria be used to establish competence of an intermediary who is to act as such in criminal proceedings involving a sexual offence:

- (a) Registration and accreditation as an intermediary.
- (b) The training and qualifications of the intermediary.
- (c) Number of years experience in working with children.
- (d) Work experience with that particular age group and culture/context of child.
- (e) If retired, how many years since retirement, has professional registration been terminated for any reason, has the retired person maintained a level of skill

through informal or voluntary employment?

- (f) Has the prospective intermediary ever been investigated for any allegation of misconduct during the course of their professional career? Has this resulted in any disciplinary action?
- (g) Has the prospective intermediary any criminal offences relating to any form of sexual offence, or any offence relating to children?
- (h) Has the intermediary ever been the subject of a Domestic Violence Protection order?

26.5.11 **Extended Use of Intermediaries**

26.5.11.1 The Project Committee on sexual offences has identified a problem. Namely, that no formalised provision exists for the use of intermediaries prior to trial. It may be necessary for a prosecutor to have the assistance of an intermediary to establish rapport with the child witness prior to the trial and to improve the prosecutor's and the child's understanding of what they are communicating to each other. The Commission is of the opinion that such a provision would not be problematic provided that the same intermediary is not used in the trial.

26.5.12 **The Commission makes no comment on the current test as set out in section 170A of the Criminal Procedure Act 51 of 1977 to determine whether a child witness, other than in a trial involving an alleged sexual offence, qualifies to have the assistance of an intermediary.**

26.6 **Recommendations**

The Commission makes the following recommendations:

1. **The amendment of section 170A of Act 51 of 1977 as follows-**

The amendment of section 170A by the insertion after subsection (4) of the following subsections:

- (5) If a court has directed that a vulnerable witness as referred to in section 13 of the Sexual Offences Act, 20.. (Act No. xx of 20..) should be allowed to give**

evidence through an intermediary, such intermediary may -

- (a) convey the general purport of any question to the relevant witness;
- (b) inform the court at any time that the witness is fatigued or stressed; and
- (c) request the court for a recess.

(6) An intermediary referred to in subsection (5) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

2. The amendment of the discretion of the court in section 170A by the insertion in the new section on vulnerable witnesses the following subsections:

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court must, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

...

(5) If the court has declared a person below the age of 18 years a vulnerable witness, the court must, subject to the provisions of subsection (8), direct that an intermediary as referred to in subsection (4)(c) be appointed in respect of such witness unless there are exceptional circumstances justifying the non-appointment of an intermediary, in which case the court must record the reasons for not appointing an intermediary.

3. The following issues be referred to the secondary legislation section in the Department of Justice and Constitutional Development as they are planning a complete re-assessment of the regulations to section 170A:

- That only persons accredited by a professional body be allowed to act as an intermediary and that certain training courses be prescribed ;
- The establishment of a cross sectoral process of selection for persons to be appointed as an intermediary; and

- **The criteria to be determined to assess competence. The Commission recommends that the following criteria be considered:**
 - (a) **registration / accreditation as an intermediary;**
 - (b) **the training and qualifications of such person;**
 - (c) **the duration of such person's experience in working with children;**
 - (d) **the extent of such person's experience in working with children of the same age group and cultural background as the witness;**
 - (e) **if such person is retired, the extent to which such person has retained the skills to work with children;**
 - (f) **factors that may disqualify such person from being appointed as an intermediary, including the fact that such person has been -**
 - (i) **convicted of a sexual offence or an offence involving children;**
 - (ii) **the subject of a domestic violence protection order;**
 - (iii) **the subject of disciplinary action taken during the course of such person's career.**
4. **The Departments of Justice and Constitutional Development and Social Development should be tasked to ensure the availability of intermediaries to all courts hearing sexual offence cases, as soon as is practicably possible. Such implementation must take into account adequate training for intermediaries if there is a lack of expertise or experience. Further, that the said Departments develop a timetable for selection, training and appointment of intermediaries on a permanent basis. Furthermore, that the Minister of Constitutional Development and Justice should report annually to Parliament on the level of implementation until such time as the intermediary system is fully in place.**
5. **That there must be provision for a vulnerable adult witness to be assisted by an intermediary. The criteria by which such assessment should be made are set out in Chapter 20 above on vulnerable witnesses.**
6. **That the court be empowered to call for expert input in regard to the question of whether or not to appoint an intermediary. This recommendation is developed in Chapter 20 above.**

CHAPTER 27**THE USE OF ANATOMICAL DOLLS****27.1 Introduction**

27.1.1 An anatomically correct doll is one equipped with parts resembling genitalia. Anatomical dolls are used to assist child witnesses to demonstrate any sexual abuse they have suffered. Such dolls are provided as a set consisting of adult dolls of each gender and child dolls also of each gender. They vary in colour, shape and size and detail, and some have features of mature sexual development, such as chest and underarm hair.¹ Dolls that have mouth, vaginal and anal openings, which children can use to demonstrate acts of penetration, are recommended.² More recently, dolls with individual fingers have appeared; this is a recommended feature as it may facilitate demonstration of digital penetration.³ Although there is no empirical data to suggest that one design of doll is more helpful than another,⁴ developmental studies suggest that a child's interaction with the doll will be more spontaneous where the dolls closely match the physical characteristics of the offender and the child.⁵ Furthermore, three experiments conducted by Priestly and Pipe suggest that increasing the physical similarity of toys and props to the items they represent in child interviews, increases a child's effectiveness in relating a personal experience.⁶ It is also recommended that dolls match the child's racial features so as to facilitate identification with the dolls.⁷

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- 1 B Boat and M Everson 'The Use of Anatomical Dolls Among Professionals in Sexual Abuse Evaluations' (1988) 12 **Child Abuse and Neglect** 171 at p 173.
 - 2 Boat and Everson (1988) 12 **Child Abuse and Neglect** at p 173.
 - 3 Boat & Everson (1988) 12 **Child Abuse and Neglect** at p 173.
 - 4 Boat and Everson 'Interviewing Young Children with Anatomical Dolls' (1988) 67 **Child Welfare** 337 at p 338.
 - 5 NC Alridge 'Strengths and Limitations of Forensic Child Sexual Abuse Interviews with Anatomical Dolls: An Empirical Review ' (1998) 20 **Psychopathology and Behavioural Assessment** 1 p 2.
 - 6 Boat and Everson 'Anatomical Dolls in Child Sexual Abuse Assessments: A Call for Forensically Relevant Research' (1998) 11 **Applied Cognitive Psychology** 69 at p 84.
 - 7 Boat and Everson (1988) 12 **Child Abuse and Neglect** at p 173.

27.2. Current position

27.2.1 Our law does not make special provision for the use of anatomical dolls in court as an evidentiary tool, but the use of anatomical dolls is permitted in terms of section 161 of the **Criminal Procedure Act**.⁸ Sections 161(1) and (2) provide:

Witness to testify *viva voce*

(1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.

(2) In this section the expression '*viva voce*' shall, in the case of a deaf and dumb witness, be deemed to include gesture language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.

27.2.2 As a result, anatomically correct dolls are regularly used in our courts to assist children in relating their allegations of abuse.

27.3 Problem stated

27.3.1 Should the use of anatomically correct dolls be further regulated?

27.4 Submissions

27.4.1 Although most respondents to Issue Paper 10 are in favour of the continued use of anatomical dolls in child sexual abuse cases,⁹ others opine that they should only be used when accompanied by neutral dolls so as to defuse the intense focus on the anatomical dolls,¹⁰ and provided that the child is assisted by a person who is trained in the use of such dolls.¹¹

8 51 of 1977.

9 **Ms C Wagner, Department Welfare and Population Development; Association for persons with physical disabilities, Northern Cape; Snr Supt JW Booysen, Serious Violent Crime, Kwa Zulu Natal, SAPS; L Soato, Bloemfontein Child Welfare Society; H Reyneke, Vryheid Child Welfare Society; Ms A Dreyer, H Coertze & I Swart, South African National Council for Child and Family Welfare; Ms WL Clark, Magistrate's Office, Verulam; Adv E Boshoff, Department of Education; Dr JM Loffell, Johannesburg Child Welfare Society.**

10 **Ms C Wagner, Department of Welfare and Population Development.**

11 **Adv Songca, University of the North.**

27.4.2 **Ms Clark**¹² submits that some children are capable of verbally describing the abuse and find the dolls a distraction. She also states that, in other cases, the dolls certainly are an invaluable tool and that each case should therefore be decided on its own merits.¹³ She also suggests that the dolls should be available in different formats so as to suggest the different race groups: children of one race group often do not relate well to dolls having the appearance of another and that the dolls should also exist in adult and child versions.

27.4.3 A word of caution is submitted by **Dr Renee Potgieter and Associates**,¹⁴ in that if the professional who uses the anatomically correct doll explores the whole doll and its anatomical parts, the method is of little use, as the approach usually contaminates the information gained by its leading and suggestive elements. If, however, the child uses the doll to demonstrate what really happened, this can be an extremely valuable way of corroborating information obtained in other ways. The use of anatomically correct dolls should be continued, but they should be used correctly. The need for training in this regard in the use and appropriateness of using such dolls is clear. It is submitted that although the use of anatomically correct dolls may prove useful they should not, in the absence of additional evidence, be regarded as conclusive.¹⁵

27.5 **Comparative analysis**¹⁶

2.5.1 **Scotland**

27.5.1.1 The Scottish Law Commission,¹⁷ suggest that the use of “anatomically correct” dolls, as an aid to giving evidence on sexual matters, should be permissible whenever a child gives evidence, subject to the discretion of the court. However, in the light of their investigation they have found it unnecessary to legislate specifically for the usage of such

12 **Ms WL Clark, Magistrate’s Office, Verulam.**

13 **These sentiments are supported by Sr Potter, Agape School for the Cerebral Palsied and Supt N Nilsson, SAPS Youth Desk, Western Cape.**

14 **RP Clinic, Pretoria.**

15 **Adv Songca, University of the North.**

16 This section is drawn substantially from the research compiled for the Commission by Ms Jones under the supervision of Prof C Admay of Duke University, USA.

17 New Zealand Law Commission ‘Report on the Evidence of Children and Other Potentially Vulnerable Witnesses’ **Preliminary Paper 26** at p 34 Wellington:1996.

aids.

27.5.2 New Zealand

27.5.2.1 In 1996 the New Zealand Law Commission published a Preliminary Paper on the **Evidence of Children and Other Vulnerable Witnesses**. Prior to the publication of this Preliminary Paper a number of statutory modifications had been introduced. These modifications were designed for children and mentally handicapped complainants in sexual offence cases which are heard by a jury. Other limited protections exist for adult complainants in sexual cases, for example, they do not usually have to appear in person at preliminary hearings (when the decision is made about whether the case should proceed to trial), but may give written evidence.¹⁸

27.5.2.2 In terms of Section 23D(1) of the **Evidence Act** 1908, before any sexual offence trial commences, the prosecutor must, if the complainant is a child or mentally handicapped person, seek a direction from the court on how the complainant's evidence is to be given. The application is heard by a judge of the court in which the accused has been committed for trial.

27.5.2.3 The alternatives provided by Statute include:

- the presentation at the trial of the videotaped interview shown at the preliminary hearing;
- the complainant giving evidence outside the courtroom by closed circuit television;
- the complainant giving evidence by audio link from behind a wall or partition; or
- the complainant giving evidence in court screened from the defendant by a screen or one way glass.

27.5.2.4 The judge hears the prosecution application in chambers, not in open court, and must give each party an opportunity to be heard. The parties may lead relevant evidence.

27.5.2.5 When considering the directions to be given concerning the way the complainant will give evidence at the trial, the judge is required to have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the

18 New Zealand Law Commission **Preliminary Paper 26** citing section 185C of the **Summary Proceedings Act** 1957.

accused.

27.5.2.6 Factors that the court may take into account include:¹⁹ the age of the complainant, this or her personality; the witness's ability to relate to the evidence; the relationship between the complainant and the accused; the nature of the charge; the importance of the evidence²⁰ and any other matters impacting on the witness when giving evidence. Anatomically correct dolls may be directed.

27.5.3 United States of America

27.5.3.1 The use of anatomically correct dolls is permitted in American criminal procedure. Child sexual abuse practitioners and experts, and the courts, are in agreement that the courtroom is an imposing and frightening environment for children.²¹ This apprehension is compounded when the child is compelled to divulge sensitive details of sexual abuse.²² Moreover, because abused children often feel more like accomplices to sexual abuse than powerless victims, making public disclosures about abuse can be emotionally damaging. Dolls are a more sensitive way of making such disclosures, but there is considerable controversy concerning their accuracy and manner of use.²³ The way in which the courts have regulated the manner in which anatomically correct dolls are used, is based on the research considered below.

27.6 Research issues in the use of anatomically correct dolls

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- 19 This statement of relevant factors cited in the New Zealand Law Commission 'Report on the Evidence of Children and Other Potentially Vulnerable Witnesses' **Preliminary Paper 26** and taken from **R v W** (1990) 6 CRNZ 157 at 158.
- 20 **R v Hauti** (1990) 6 CRNZ 599 at 602.
- 21 R Cares 'Videotaped Testimony of Child Victims' (1986) 65 **Mich B J** at p 46; K MacFarlane 'Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse' (1985) 40 **University of Miami Law Review** 135 at p 145.
- 22 MacFarlane 'Videotapes in Child Sexual Abuse' (1985) 40 **University of Miami L. Rev.** 135 at p 145.
- 23 Boat and Everson (1998)11 **Applied Cognitive Psych.** 69 at p 84; B Bottoms & G Goodman **Child Victims, Child Witnesses: Understanding and Improving Testimony** (1st ed. 1993) at p 53; Aldridge (1998) 20 **Psychopathology & Behavioral Assessment** 1; A Weinerman 'The Use and Misuse of Anatomically Correct Dolls in Child Sexual Abuse Evaluations: Uncovering Fact ... or Fantasy?' (1995) 16 **Women's Rts. L. Rep.** at p 347;

27.6.1 The controversies centre around the following research questions:

27.6.1.1 (a) Do anatomically correct dolls influence children's thoughts?

27.6.1.2 Opponents of anatomically correct dolls claim that, because of their prominent sexual appendages, dolls are suggestive and evoke fantasy in children.²⁴ They may thus influence non-abused children to make false allegations of abuse.²⁵ A review of the research indicates a trend to refute the suggestiveness criticism.²⁶ As an example, a study conducted in 1988 found that non-abused children demonstrated little interest in anatomically correct dolls in the presence of an observer and again on their own.²⁷ This finding is significant because one would expect to find a high frequency of sexually explicit doll play if the dolls are suggestive and sexually stimulating to children, particularly if no adults are present.²⁸

27.6.1.3 Do anatomically correct dolls make children more susceptible to misleading questioning?

27.6.1.4 A common critique of anatomically correct dolls is that their suggestive appearance may influence young children when they are asked misleading questions.²⁹ In a study conducted in 1990,³⁰ 80 children aged three and five years engaged in a non-threatening game in which they had a tea party with the experimenter and played with a hula hoop. The children were interviewed one week after the play session. Each age group was

24 Boat and Everson (1998) 12 **Child Abuse and Neglect** at p177.

25 D Glasser and C Collins 'The Response of Young, Non-Sexually Abused Children to Anatomically Correct Dolls' (1989) 30 **Journal Child Psychol. Psychiatry** 547 at p 548.

26 GS Goodman and C Aman 'Children's Use of Anatomically Detailed Dolls to Recount an Event' (1990) 61 **Child Dev.** 1859, 1867; KF Saywitz *et al* 'Children's Memories of Physical Examinations Involving Genital Touch: Implications for Reports of Child Sexual Abuse' (1991) 59 **J. Counselling and Clinical Psychol.** at p 682.

27 Glasser and Collins 'The Response of Young, Non-Sexually Abused Children to Anatomically Correct Dolls' (1989) 30 **Journal Child Psychology Psychiatry** 547 at p 548.

28 Everson and Boat 'Putting the Anatomical Doll Controversy in Perspective: An Examination of the Major Uses and Criticisms of the Dolls in Child Sexual Abuse Evaluations' (1994) 18 **Child Abuse and Neglect** 113 at p 122.

29 Weinerman (1995) 16 **Women's RTS L Rep** at p 347.

30 Goodman and Aman 'Children's Use of Anatomically Detailed dolls to Recount an Event' 61 **Child Dev** (1990) 1859 at p 1859-71.

split into four categories and interviewed under one of four conditions: the first group was interviewed using anatomically correct dolls; the second was interviewed using regular dolls; the third was interviewed using dolls that were out of touch but in view; and the fourth group was interviewed without any dolls at all. The children were asked a set of specific and misleading questions, some of which were sexually suggestive. In those conditions in which a doll was used, the children were asked to demonstrate their answers using the dolls. The results showed that overall the doll conditions did not increase the chance of a false report of abuse.³¹ Moreover, the use of dolls increased the five-year-old's accuracy of response. Overall, the three-year-olds' responses were less accurate than that of the five-year-olds, but the doll condition was not an influence.³² From this, the researchers concluded that anatomically correct dolls do not make children more suggestible to misleading questioning or increase the chance of a false reporting.³³

27.6.1.5 In another study, 72 five and seven year-old girls were given a physical examination by a female physician. As part of their examination, half of the children received a genital examination and half received a scoliosis examination. Up to one month later, the children's memories of the examination were tested, first through free recall and then with the use of anatomically correct dolls. In the doll-aided, direct questioning phase, the children were asked a series of misleading questions, such as "how many times did the doctor kiss you?" The children showed a high resistance to the misleading questions with near perfect accuracy.³⁴ Moreover, no child reported genital touching when it did not occur.

27.6.1.6 Does the use of anatomically correct dolls promote evaluator error and misuse?

27.6.1.7 Critics contend that the use of anatomically correct dolls encourages the following types of misuse and error: (a) overly leading questioning that may include the

31 Goodman and Aman (1990) 61 **Child Dev** 1859 at p 1867.

32 Goodman and Aman (1990) 61 **Child Dev** 1859 at p 1867. The study suggests that the higher error rate for the three-year-olds' is attributed to the fact that three-year-olds comprehend less and cannot represent doll to themselves.

33 Goodman and Aman (1990) 61 **Child Dev** 1859 at p 1869.

34 Everson and Boat 'Putting the Anatomical Doll Controversy in Perspective: An Examination of the Major Uses and Criticisms of the Dolls in Child Abuse and Evaluations' (1994)18 **Child Abuse and Neglect** 113 at p 124.

interviewer posing the dolls to model specific sexual acts; (b) over-interpretations of the child's behaviour with the dolls; and (c) over-reliance on the dolls at the expense of other communication techniques and non-verbal tools, such as drawings, puppets, toy telephones.³⁵ Since anatomically correct dolls were first introduced in the 1970's, experts contend that overemphasis on the dolls has led to an underemphasis on the training of evaluators in proper interview techniques and the development of sound clinical judgement.³⁶

27.6.1.8 A 1990 study suggests that using the dolls as a demonstration aid (in other words, by posing the dolls) combined with overly suggestive or leading questions may inadvertently suggest visual imagery to the child that becomes incorporated in the child's memory, and thus leads the child to make a false report of abuse.³⁷ Because a child's demonstration with dolls is greatly influenced by the skill with which the interviewer handles the interview process, all experts stress that practitioners must receive comprehensive training on how to use the dolls properly.³⁸ In addition, experts suggest that interviewers should have knowledge of early child development, including children's ability to recall.³⁹

27.6.1.9 Because there is no scientific method for interpreting results, an interviewer's personal biases may affect interpretations of children's play with the dolls, thereby making the results unreliable.⁴⁰ Training is also needed to encourage uniformity of interpretation among interviewers so that results will be reliable and consistent. A 1988 study⁴¹ of 295 members of four professional groups consisting of child protection workers, law enforcement officers, mental health practitioners and physicians were surveyed to ascertain their interpretations of evidence supporting abuse and their interpretations of young children's

35 Everson and Boat (1994) 18 **Child Abuse and Neglect** at p 125.

36 Everson and Boat (1994) 18 **Child Abuse and Neglect** at p 126.

37 L Terr **Too Scared to Cry: psychic trauma in childhood** New York: Harper and Row 1st ed. 1990.

38 GY Lie and A Inman 'The Use of Anatomical Dolls as Assessment and Evidentiary Tools' (Sept. 1991) **Social Work** at p 398; Boat and Everson 'Interviewing Young Children with Anatomical Dolls' (1988) 67 **Child Welfare** 337 at p 338.

39 Boat and Everson (1988) 67 **Child Welfare** 337 at p 339.

40 IJ Sagatun and LP Edwards **Child Abuse and the Legal System** (1st ed. 1995) at p 401; RJ Levy 'Using Scientific Testimony to Prove Child Sexual Abuse' (1989) 23 **Fam. L.Q.** 383 at p 401.

41 Boat and Everson (1988) 12 **Child Abuse and Neglect** at 177.

interactions with the dolls. The evidence included: “hard” medical evidence such as a positive sexually transmitted disease culture, tearing or semen; the child’s verbal description of abuse; extreme fear of the alleged perpetrator; sexually provocative behaviour or sexualised language by the child; “soft” medical evidence such as genital irritation or bruising; avoidance or anxiety about the unclothed dolls; behavioural problems or depression in the child. Aside from “hard” medical evidence, which nearly all professionals found “very convincing” evidence of abuse, there was no uniformity of opinion as to which types of evidence would provide convincing proof of sexual abuse.⁴² The same groups were also surveyed for their opinions as to “normal” play behaviour with the dolls. A sample of the behavioural options included undressing the dolls, staring at the doll's genitals, touching the genitals, avoiding the dolls and different types of penetration. There was no single behaviour that all professional groups were unanimous in agreeing would be normal play behaviour by young children.⁴³ The results of this study clearly demonstrate the need for guidelines outlining normal and abnormal play behaviour by children so that there will be uniformity in interpreting evidence of sexual abuse. The research concludes that guidelines on interpretation are desirable.⁴⁴

27.6.1.10 Numerous studies have been conducted with the purpose to determine whether an interview using anatomically correct dolls can distinguish between abused and non-abused children.⁴⁵ The results from these studies have been contradictory.⁴⁶ However, many of the studies find that sexually abused children show more explicit sexual activities

42 Boat and Everson (1988) 12 **Child Abuse and Neglect** at p 174-75.

43 Boat and Everson (1988) 12 **Child Abuse and Neglect** at p 177.

44 Goodman and Bottoms **Anatomical Dolls in Child Sexual Abuse Assessments: A Call for Forensically Relevant Research** at p 53.

45 S White *et al* 'Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls' (1986) 10 **Child Abuse and Neglect** at p 519; L Jampole and MK Weber 'An Assessment of the Behaviour of Sexually Abused and Nonsexually Abused Children with Anatomically Correct Dolls' (1987) 11 **Child Abuse and Neglect** 187; RL August and BD Forman 'A Comparison of Sexually Abused and Non-Sexually Abused Children's Behavioral Responses to Anatomically Correct Dolls' (1989) 20 **Child Psychiatry Human Dev.** 39 at p 43-44.

46 Aldridge 'Strengths and Limitations of Forensic Child sexual Abuse Interviews and Anatomical Dolls: An Empirical Review' (1998) 20 **Psychopathology & Behavioural Assessment** 1 at p 34.

involving dolls,⁴⁷ are more likely to engage in sexually related behaviours including enacting sexual activity and referring to the dolls' private parts more frequently than children who were not abused.⁴⁸

27.6.1.11 In evaluating a young child's response to anatomically correct dolls, interviewers should be aware of the effect that age, race and socioeconomic status may contribute to differences in non-sexually abused children's interactions with anatomically correct dolls. In a 1994 American study,⁴⁹ 223 two to five-year-old non-abused children were interviewed with anatomically correct dolls to determine the effect of demographic factors on a child's knowledge of human functioning, anatomy and sexuality. Significant differences existed within differing age, race and socioeconomic groups.⁵⁰ The two-year-olds did not demonstrate any sexualised behaviour with the dolls. Most three-year-olds manually explored the dolls. The four and five-year-olds demonstrated a decrease in manual exploration and an increase in demonstrating doll-to-doll kissing and stimulated intercourse. Black children, especially boys aged four and five of low socioeconomic status, demonstrated more sexualized behaviour than their white counterparts. The authors of the study account for this difference by explaining that members of low socioeconomic status frequently live in crowded conditions in which there may be greater opportunity for exposure to sexual activity, and the parents of several of these children cited accidental exposure to sexually explicit videos or observations of sexual interactions as sources of their children's sexual knowledge.

2976.1.12 The results of this study suggest that demographic factors such as age, race and socioeconomic status may effect a non-abused child's sexualised behaviour with the dolls. In evaluating an interview, an interviewer should be aware of these differences and be careful to ascertain that sexualised demonstrations with dolls exhibited by young children whose demographics make them more prone to sexualized behaviour are reflecting personal abuse (such as "this is what happened to me") rather than sexual knowledge from incidental

47 August and Forman **A Comparison of Sexually Abused and Non-Sexually Abused Children's Behavioral Responses to Anatomically Correct Dolls** at p 43-44; Aldridge (1998) **20 Psychopathology & Behavioural Assessment** at p 34.

48 Aldridge (1998) **20 Psychopathology & Behavioural Assessment** at p 34.

49 Boat and Everson 'Exploration of Anatomical Dolls by Non-Referred Preschool-Age Children: Comparisons by Age, Gender, Race and Socioeconomic Status' **18 Child Abuse & Neglect** at p 139.

50 Gender did not significantly influence the child's interactions with the dolls.

exposure.⁵¹

27.6.1.13 Children must be old enough to interpret the dolls as a representation of themselves. Children four and over readily demonstrate this ability and recognise props as representations of actual items and are able to use that relationship when communicating past events.⁵² Children under four cannot use models to represent real items from the past and the use of dolls with such children is inappropriate.⁵³

27.6.1.14 Do anatomically correct dolls traumatise children?

27.6.1.15 A study conducted in 1989 found that anatomically correct dolls do not traumatise young children.⁵⁴ In this study, 91 non-sexually abused children aged three to six were observed playing with anatomically correct dolls in unstructured play settings. The results show that the children were aware of the dolls' difference, were willing to interact with the dolls and engage them in imaginative play and demonstrated a positive response to the dolls.⁵⁵

27.7 Evaluation

29.7.1 There is considerable controversy concerning the use of anatomically correct dolls to elicit testimony from children regarding alleged sexual abuse. Neither proponents nor opponents of anatomically correct dolls contend that the dolls can be used as a scientific test for abuse - in fact, there is little evidence to support the dolls' reliability as an assessment and evidentiary tool. But sight should not be lost of the real purpose of an anatomically correct doll: they may help children to supply information from which inferences about sexual abuse can be drawn. Dolls may help children describe those acts that they are unable or unwilling to describe verbally, and there is no reason to discard their use. Each case depends on its own circumstances and the appropriate use of such dolls depends on

51 Boat and Everson 18 **Child Abuse & Neglect** at p 151.

52 Boat and Everson (1988) 12 **Child Abuse & Neglect** at p175.

53 JS DeLoache and DP Marzolf 'The Use of Dolls to Interview Young Children: Issues of Symbolic Representation' (1995) 60 **J. Exp. Child Psychol.** 155 at p 161.

54 Glaser and Collins 'The Response of Young, Non-Sexually Abused Children to Anatomically Correct Dolls' (1989) 30 **Journal Child Psychology** 547 at p 547-560.

55 Glaser and Collins (1989) 30 **Journal Child Psychology** at p 558-59.

the assessment of the prosecutor.

27.7.2 However, it is necessary to mention the very real problem that child victims or other child witnesses may come to court after having had prior exposure to anatomical dolls during the investigative stage. The difficulty herein is that other occupations, in the investigative stage, may make use of anatomical dolls in an inconsistent manner and this may influence the child's interaction with the anatomical doll during trial. As a result the uncontrolled use of anatomical dolls outside the courtroom poses a genuine threat of contaminating evidence and as such it is imperative that training be introduced for the consistent use of anatomical dolls by all the disciplines using them in relation to sexual abuse cases.

27.7.3 It is not a field which requires further legislative regulation, but it is clear that comprehensive training on how to use anatomically correct dolls properly is needed, with guidelines. These are the conclusions to be drawn from both the international research, the comparative studies and the South African experiences stated in the submissions made to the Issue Paper. Methods to assess and interpret the use of anatomically correct dolls which accord with South African experiences need to be developed, as the racial and socio-economic factors considered in the American research may not accord with South African racial and socio-economic demographic differences.

27.8 **Recommendations**

1. **It is recommended that the use of anatomically correct dolls be continued, but that it is not necessary to legislate specifically for the use of anatomically correct dolls as it is adequately provided for in section 161(2) of the Criminal Procedure Act.⁵⁶ The matter should be left to the discretion of the prosecutor to determine when it is appropriate to make use of tools as each case should be judged on its merits.**

2. **It is recommended that an inter-sectoral project be established, to be housed in the Department of Justice and Constitutional Development, that is tasked with undertaking a consultation process with all role-players to assess:**

- **their training needs in this regard to the use of anatomically correct dolls;**
- **whether there is a need for standardised dolls to be used as there is potentially substantial variation in the types of anatomically correct dolls that are used;**
- **whether there is a need for guidelines to be developed for effective use of anatomically correct dolls to be set forth in a written protocol;**
- **which role players should be involved in the drafting of such a protocol; and**
- **if such a protocol is necessary, whether it should be reviewed to ensure that training is kept current.**

CHAPTER 28**SURROGATE WITNESS****28.1 Introduction**

28.1.1 A surrogate witness is a person who interviews a child victim out of court and then attends court on behalf of that victim and presents the child's evidence to the court. This option is presently not available in South Africa.

28.2 Comparative analysis¹

28.2.1 In 1955 the "surrogate witness" approach was introduced in Israel.² The aim was to protect the child victim from the trauma associated with testifying. Although this system is used for child victims, it could just as easily be used for adult victims of sexual offences. Its main features are:

- * A child victim of a sexual offence is interviewed at an early stage by a "youth interrogator".
- * The child is not required to give evidence in court unless the interrogator gives permission. If the child does testify, the court may excuse the child if the interrogator is of the view that continuation may cause emotional harm.
- * If the child does not testify, the interrogator presents the evidence and may be cross-examined.
- * An accused cannot be convicted on the evidence of the interrogator unless it is corroborated by additional evidence that the crime was committed by the accused.

1 The researchers were not able to find any other comparative jurisdiction that has a similar system to that of surrogate witnesses.

2 For a discussion of this system, see E Harnon "Examination of children in Sexual offences -the Israeli law and practice" 1988 **Criminal Law Review** 263.

28.3 Submissions

28.3.1 Issue Paper 10 posed the question as to whether South Africa should adopt a similar system. The majority of respondents responded in the affirmative.³ According to **Mr Johan Brits** the child's presence should not necessarily be required. Although this appears to be an infringement of the Constitutional rights of the defendant, **Mr Brits** argues that it is clear that this is an instance where the rights of the child weighed up against those of the defendant should receive preponderance as envisaged in section 36 of the Constitution. **Ms K Vervaart**⁴ indicates her approval of such a system provided that the victim is allowed to testify personally if he or she should want to, if a person other than the interrogator asks the victim if he or she really does not want to testify personally or if the victim can interrupt by bleep from the one-way mirror room if he or she feels he or she is being inaccurately represented.

28.3.2 **Dr Renee Potgieter and Associates**⁵ are unequivocally in favour of introducing this system. Their opinion in this regard follows:

The cases of children up to 8 years of age should be handled by surrogate witnesses as standard procedure. The child should not be given a choice here, as the child at this age is incapable of comprehending the issues involved to enable him to make an informed choice. A surrogate witness obviates much of the adaptation of court procedures such as the use of an intermediary and training of magistrates and state prosecutors to accommodate the child as witness. It also eliminates the child being involved in stressful waiting for the occasion on which he has to testify, and most important, it enables professionals to start therapy on the child immediately after the statement and medical examinations have been completed. In cases involving children over 8 and up to 13 years, the child should have the right to choose whether he wants to be represented by a surrogate witness, an intermediary or to testify in the open court. In cases involving children of over 13 years, the child should have the right to choose between an intermediary and the open court.

3 **Association for persons with physical disabilities, Northern Cape; Sr Potter, Agape School for the Cerebral Palsied; H Reyneke, Vryheid Child Welfare Society; Ms A Dreyer, H Coertze & I Swart, South African National Council for Child and Family Welfare; Johan Brits; Ms K Vervaart, Department of Social Services, Provincial Administration: Western Cape; Dr Renee Potgieter and Associates, RP Clinic, Pretoria; Adv E Boshoff, Department of Education.**

4 **Department of Social Services, Provincial Administration: Western Cape.**

5 **RP Clinic, Pretoria.**

28.4 Evaluation

28.4.1 The major advantages of this approach are that it greatly restricts the exposure of the child to proceedings which may be harmful, that the courts do not directly supervise the examination of the child and that they have to rely upon the interrogator for interpretation and assessment of the evidence.

28.4.2 The system of surrogate witnesses in Israel was assessed by the Melamed Committee which was appointed by the Israeli Minister of Justice in 1985 to consider criticisms of the system from lawyers, jurists and mental health professionals.⁶ The complaints summarised by Melamed were numerous. Police officers criticised the quality of evidence obtained by youth investigators (the surrogate witness), blaming this for the reduction in number of arrests and convictions. Some legal scholars were concerned that the rights of defendants were so seriously compromised that they were not allowed fair trials and child advocates argued that the failure to punish child molesters left other children at continued risk of maltreatment.⁷

28.4.3 One of the most important recommendations made to the Melamed Committee was formulated to allow judges, in one form or another, to assess their own impressions of a young witnesses credibility. Surprisingly, the Melamed Committee report has only led to a requirement that all interviews with the youth investigator and the child witness be audiotaped. Sternberg *et al* conclude that although the youth investigator or surrogate witness has been successful in protecting children from repeat investigations and the trauma of testifying in court, it appears to have impeded the prosecution of perpetrators.

28.4.4 Despite the advantages of the surrogate witness system and the submissions in favour thereof the Commission has elected not to adopt this option as it is of the opinion that the infringement of the accused's right to a fair trial is not justifiable in an open and democratic society. Firstly, the court will be unable to assess demeanour. Secondly, the surrogate witness may not have put all the questions to the complainant that the defence may seek to cover. Thirdly, it is a costly option requiring additional state resources and court time. Fourthly, there

6 Sternberg Lamb & Hershkowitz **Child sexual Abuse Investigations in Israel** in Bottoms and Goodman (eds) **International Perspectives on Child Abuse and Children's Testimony** at p 66ff SAGE Publications London 1996

7 Sternberg et al at p 74.

are less drastic and more workable alternatives to protecting the child witness and recommendations in this regards are set out elsewhere in this discussion paper.

28.5 **Recommendation**

The Commission recommends that the system of surrogate witnesses or youth investigators should not be introduced in the proposed sexual offence legislation or the Criminal Procedure Act 51 of 1977.

CHAPTER 29**SUPPORT PERSONS****29.1 Introduction**

29.1.1 For the purposes of the current investigation, we consider a support person to be someone who accompanies either a witness or the accused through the criminal justice process. This person is to strengthen and encourage the witness emotionally by his or her physical presence.

29.2 Current position

29.2.1 There are four provisions in the **Criminal Procedure Act** 51 of 1977 that deal with support for certain witnesses:

- In terms of section 153(3A) the court has a discretion, on the request of the victim, to order an *in camera* hearing in trials involving an alleged indecent act. In such cases, the complainant may request that certain persons remain in court.
- Section 73(3) of the **Criminal Procedure Act** provides that an accused who is under the age of 18 years may be assisted by his or her parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.
- Section 74 of the **Criminal Procedure Act** provides that where an accused is under the age of 18 years a parent or guardian shall be warned to attend the relevant criminal proceedings.
- Section 191A of the **Criminal Procedure Act** authorises the Minister of Justice to determine services to be provided to a witness who is required to give evidence in any court of law. This includes making regulations relating to the assistance of and support to witnesses at court.¹ No regulations have been promulgated in terms of this section.

1 Section 191A (2).

29.3 **Problem stated**

29.3.1 There are a number of difficulties as section 73(3) of the **Criminal Procedure Act**² provides for the assistance of accused persons, no specific provision is made for the presence of a support person for other witnesses. Further, section 153(3A) does not indicate what support the person(s) who remain in court may give to the complainant.

29.3.2 It is widely recognised that testifying in court is a traumatic event, particularly when giving evidence in a sexual offence. As a support person may render a service to both the court and a witness, it is necessary to consider whether there is a need to introduce specific primary legislative provisions that establishes a court's power to authorise the presence of a support person and describe that person's role, where necessary.

29.4 **Submissions**

29.4.1 In response to related questions posed by Issue Paper 10 a number of respondents included submissions relating to the need for support persons.

29.4.2 The office of the **Attorney General, Transvaal** submits that it should be expressly allowed that a person whom the child wishes to accompany him or her, also be present. This view is shared by the **Department of Health, Mpumalanga** which believes that a child witness should have a choice if he or she wants a parent or significant other with him or her while testifying.

29.4.3 The **Northern Province's Local Government and Traditional Authorities** are of the opinion that one of the ways of making the courts more child-friendly would be to allow a child to speak through someone they know. The **South African National Council for Child and Family Welfare** recommends that during the court process all children should have access to an adult of his or her choice to support him or her. The **Vryheid Child and Family Welfare Society** supports the notion that consideration should be given to the child's needs with regard to who is present in court, as does **Ms Pillay**³ and the **Department Welfare and Population**

2 51 of 1977.

3 A social worker from Kwa Zulu Natal.

Development, Gauteng.

29.5 Comparative analysis

29.5.1 Australia

29.5.1.1 Recognition of the importance to a child witness of emotional and practical support during a time of stress has led some courts to allow the presence of support persons without legislative authority.⁴ In some Australian jurisdictions the practice has been given legislative authority.⁵

29.5.1.2 In the state of Victoria, section 37C(3)(c) of the **Evidence Act** 1958 makes provision for alternative arrangements in giving evidence by permitting a person to be beside the witness while he or she is giving evidence for the purpose of providing emotional support.

29.5.1.3 In Queensland, section 21A(2)(d) of the **Evidence Act** 1977 provides that where a special witness is to give evidence the court may order, on its own motion or upon application made by any party to the proceeding, “that a person approved by the court be present while the special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness”. A special witness is defined as “a child under 12 years; or a person who in the court’s opinion would, as a result of a mental, intellectual or physical impairment be likely to be a disadvantaged witness; or would be likely to suffer severe emotional trauma; or would be likely to be so intimidated as to be disadvantaged as a witness“.⁶

29.5.2 New Zealand

29.5.2.1 In New Zealand a child under 16 years of age is entitled, while he or she is giving evidence in a proceeding in any court, to have near him or her a person who may provide the

4 Report on **Evidence of Children and Other Vulnerable Witnesses** Project 87 The Law Reform Commission of Western Australia April 1991 at p 89.

5 See further South Australia Section 12(4)-(5) **Evidence Act** 1929 and the **Magistrate’s Court Act** 1989 Schedule 5 cl 15(3)(ba).

6 Section 21A(1).

child with support. The support person must be approved by the court and is not to be a person who is a witness or a party in the proceedings.⁷

29.5.3 South Africa

29.5.3.1 Section 11(f) and (g) of the **Domestic Violence Act**⁸ provides that no persons may be present during the hearings in terms of the Act, except the complainant and the respondent who may have not more than three persons for the purpose of providing support respectively. The Court has the discretion to permit other persons to be present⁹ and a proviso to section 11 authorises the court, if it is satisfied that it is in the interests of justice, to exclude any person from attending any part of the proceedings.

29.5.3.2 While the proceedings in terms of this Act are of a civil nature, it nevertheless recognises the important principle of the need for support when testifying in court in respect of matters which are highly personal.

29.6 Evaluation

29.6.1 The purpose behind the introduction of legislation authorising a support person to accompany a witness is to provide emotional support to a witness. Its aim is to make a witness more secure in the criminal justice process, particularly when giving evidence.

29.6.2 Our criminal procedure does, in relation to the alleged commission of an indecent act, provide that when a court orders an *in camera* hearing, the victim may request that certain persons remain in court.¹⁰ Theoretically this provision may be interpreted to provide for a support person to remain with the victim. However, it exists by virtue of being a limit on *in camera* hearings and the role of the person so requested to remain in court is not elaborated on.

7 Section 106E of the **Evidence Act** 1906.

8 116 of 1998.

9 Section 11 (h).

10 Section 153(3A) of the **Criminal Procedure Act** 51 of 1977.

29.6.3 The Commission recommends that provision be made in the new Sexual Offences Act for the use of support persons by all witnesses. The Commission recognises the importance of reducing secondary trauma to the victim, but would not limit such protection to the victim only. Any witness, who need not be the victim, may be extremely traumatised and needs to be encouraged to come forward, give evidence and leave the court process with as little trauma as possible. This includes both a child and adult witness.

29.6.4 One obvious advantage to having a system which allows a support person to accompany a witness while giving evidence in court is that it will reduce the trauma to the witness without placing any additional financial burden on the criminal justice system.

29.6.5 The Commission considered the issue of what the qualification should be for a support person. The Commission concludes that it must be a person whom the victim or witness chooses, provided that the support person is not a witness in the proceedings to ensure that evidence is not contaminated in any way. The object is to put the victim or witness at ease and enable him or her to discuss his or her experience in court. To then insist on a list of qualifying criteria will defeat the object of the section. The advantage of not requiring a special qualification to act as a support person means that the trial process will not be unreasonably delayed owing to compliance with regulations and tests for competence to act as a support person. However, the court should have the discretion to disapprove of a support person if it is satisfied that it will not serve the interests of justice to appoint such person.

29.6.6 The support person's role will be to provide emotional support to the witness by being seated beside him or her while the witness is giving a statement or testifying. Further, the support person should not be allowed to speak in court or outside court to the relevant witness while that witness is still under oath or giving evidence and the support person should not interfere with the witness while they are giving evidence. The Commission recommends that the court should explain the role of a support person to a person acting as such.

29.6.7 The Commission recognises that the entire process from reporting a sexual offence through to the finalisation of the trial is difficult for a witness, and that each witness experiences varying degrees of nervousness and trauma. Consequently, it is important that the support person be able to accompany the witness from the time of reporting the offence, through investigation, medical or other examinations and through the criminal justice process.

29.6.8 **The Commission recommends the introduction of a clause in the new sexual offence legislation that will provide that all witnesses in criminal proceedings involving an alleged sexual offence will be entitled to the presence of a support person of their choice, who may be seated beside that witness while he or she is giving evidence. The court should explain to the support person that they may not speak in court or outside court to the relevant witness while that witness is still under oath or giving evidence and the support person should not interfere with the witness while they are giving evidence.**

29.6.9 In relation to a child witness the Commission is of the that opinion it is important for child input to be heard and so it is necessary that the proposed new clause should include a provision that the child witness be afforded the opportunity to express his or her opinion on whether he or she wants a support person in court, and in particular who that person should be.

29.6.10 **The Commission recommends that the new clause make provision for a witness to be heard on the issue of the presence and choice of a support person.**

29.6.11 Furthermore, it must be borne in mind that this proposed new clause is limited, by virtue of the mandate of this project, to witnesses in criminal proceedings involving an indecent act or other sexual offence and it is not proposed to extend this proposed provision to all witnesses.

29.6.12 A very real problem for persons accompanying witnesses to court is the lack of funds to pay transport expenses. These expenses may then become an obstacle to the application of the recommendations made above in regard to support persons. For this reason **the Commission recommends that the State should bear transport costs, in the form of a transport allowance, for one support person per witness who is giving evidence in court in cases of a sexual offence.**

The Commission makes the following recommendation:

29.6.13 **Recommendation**

Appointment of support persons

14. (1) Whenever criminal proceedings involving the commission of any sexual offence are pending before any court and a witness, including the complainant, is to give evidence in such court, the court may at any time on its own initiative or upon request by -

- (a) the prosecutor;
- (b) such witness;
- (c) the parent, guardian or person *in loco parentis* of such witness if that witness is below the age of 18 years;
- (d) a social worker;
- (e) a lay counsellor; or
- (f) a medical officer

direct that such witness be accompanied by a support person of the witness's choice when making statements to any person, being interviewed or giving evidence in court.

(2) The court may, notwithstanding a request in terms of this section, refuse the appointment of a support person of the witness's choice if the court is of opinion that the appointment of such person as support person will not be in the interests of justice.

(3) A support person appointed in terms of this section may accompany and be seated next to the relevant witness while such witness is making statements to any person, being interviewed or giving evidence in court.

(4) The court may, if it deems it to be in the interests of justice and in the best interests of the witness, at any time revoke the appointment of a support person and may appoint another person in his or her place.

(5) Whenever a witness in respect of whom a support person has been appointed is to give evidence in court, such person shall affirm to the court prior to giving support that he or she will -

- (a) assist the court to the best of his or her ability; and
- (b) not in any manner interfere with the witness or the evidence being given.

(6) The State shall pay to a support person appointed in terms of this section a prescribed transport allowance for the duration of the period that such person is required to assist a witness giving evidence in court.

CHAPTER 30**EVIDENCE: THE GENERAL RULES AND THEIR IMPLICATIONS FOR VICTIMS OF SEXUAL OFFENCES****30.1 Introduction**

30.1.1 In general, people who give evidence do so orally, in one of the official languages, in the courtroom with all participants present and in sight of one another. Proceedings are normally open to the public.¹ The defendant in a criminal case may be represented by a lawyer, depending on the seriousness of the offence and the choice of the defendant. The prosecution and the defence both decide how to present their cases, including which witnesses to call to give evidence. However, the victim (complainant) is not a party to the legal proceedings and is not legally represented. The victim is a witness for the State and is called by the prosecutor who appears on behalf of the State.

30.1.2 If summoned to give evidence, a witness must do so.² The witness usually goes into the witness box unaccompanied, swears or affirms³ that he or she will tell the truth, and usually gives evidence by responding to questions. The witness first answers the questions posed by the party in whose interests they were called - this is called "evidence in chief". The opposing party then has the right to cross-examine⁴ the witness. After cross-examination, the witness may be re-examined by the party who called them. A defendant in a criminal case, who is not represented by a lawyer, may examine, cross-examine and re-examine a witness in person. The presiding officer may also ask questions of any witness.

30.1.3 The rules governing how witnesses give evidence are intended to promote the rational ascertainment of facts. The goal of promoting the rational ascertainment of facts has obvious implications for the rules and procedures which govern who gives evidence and how that evidence is given. Since excluding relevant evidence runs counter to this goal, the rationale

¹ Section 152 **Criminal Procedure Act**.

² Section 179 of the **Criminal Procedure Act**.

³ Section 162 and 163 of the **Criminal Procedure Act**.

⁴ Section 166 of the **Criminal Procedure Act**.

behind any exclusionary rule must be closely scrutinised. The benefit of enabling a witness to give evidence which is presently excluded due to the ambit of a rule of evidence or to give evidence in an alternative way, is that the rational ascertainment of facts will be promoted by enhancing reliability and facilitating communication.

30.2 Current law

30.2.1 The South African rules of evidence are found in local statutes and, where these are silent on a specific topic or issue, the English law of evidence which was in force in South Africa on the 30th of May 1961 serves as our common law. The **Criminal Procedure Act**⁵ and the **Civil Proceedings Evidence Act**⁶ contain provisions to this effect.⁷ The accusatorial system is applicable in South Africa (with a few exceptions).⁸

30.2.2 Generally evidence for either party must be given orally by the witnesses in the presence of the parties.⁹ A few exceptions exist, for example section 170A of the **Criminal Procedure Act** allows for evidence to be given through intermediaries where it appears to the court that a witness under the age of 18 years would be exposed to undue mental stress or suffering if he or she testifies in open court. The rationale of this practice of orality is that parties should have an opportunity to confront the witnesses who testify against them, and should be able to challenge the evidence by questioning. The manner in which oral evidence is presently obtained may greatly affect the content and quality of the evidence given, for example no provision is made for the use of an intermediary by an intellectually impaired adult sexual offence victim. Mechanisms aimed at enhancing the manner in which oral evidence is given or obtained from victims of sexual offences will be dealt with below. Another stumbling block in determining the truth of the matter being heard before the court is that certain evidence is excluded from the

⁵ Act 51 of 1977.

⁶ Act 25 of 1965.

⁷ Schwikkard, Skeen and Van der Merwe **Principles of Evidence** Juta & Co Cape Town 1997 at pp 21.

⁸ The accusatorial trial procedure has three leading features namely that the parties are in principle responsible for the presentation of evidence in support of their respective cases; the adjudicator is required to play a passive role; and much emphasis is placed upon oral presentation of evidence and cross examination of witnesses.

⁹ Section 161 of the **Criminal Procedure Act** provides that a witness in criminal proceedings should give evidence *viva voce*.

court as a result of rules of evidence such as the cautionary rules and hearsay rule. In many cases no justification for the continued application of these rules exists. Many of the existing rules of evidence pertaining to sexual offence cases have their origin in an era where juries still existed. Judges were for example required to caution juries before accepting the evidence of complainants in sexual offence cases on the ground that such evidence is inherently potentially unreliable. The rationale of cautioning the jury was for the most part that juries were made up of legally unqualified individuals. As the jury no longer exists and the court is presided over by a legally qualified officer who is able to weigh the evidence put before the court, the rationale for a caution in these matters deserves attention. The cautionary rules will be dealt with in more detail in a subsequent chapter.

30.2.3 More and more frequently law-makers are adapting the rules of evidence in order to ensure that the truth is ascertained. One such example is found in section 26(3) of the **Small Claims Court Act**,¹⁰ which provides that a party to the proceedings shall neither question nor cross-examine any other party to the proceedings. Further, that the presiding officer shall proceed inquisitorially to ascertain the relevant facts. However, section 26(3) provides that the presiding officer has the discretion to allow any party to question any other party.

30.2.4 Another important exception is section 30(1) - (3) of the **Restitution of Land Rights Act**¹¹ which introduced innovative inquisitorial elements into South African Law. It allows for the admission of hearsay evidence surrounding the dispossession of land, empowers the court to admit evidence whether or not such evidence is admissible in any other court and introduces the notion of weighing the evidence admitted.

30.3 Submissions

30.3.1 The **South African National Council for Child and Family Welfare** is of the opinion that the rules of evidence in rape cases have been the biggest stumbling block to instituting prosecutions, let alone, obtaining a conviction. The offender, according to them, has a much stronger legal position than the victim and the prosecutor is also at a disadvantage.

30.3.2 The **Tshwaranang Legal Advocacy Centre** emphasises the importance of training

¹⁰ Act 61 of 1984.

¹¹ Act 22 of 1994.

magistrates in dealing with a child victim giving evidence. Similarly the **Deputy Chief State Law Adviser (Free State Provincial Government)** is of the opinion that everything should be done to make it easier for children to give evidence in court. He opines that it will be better if special courts are established for children as these would have the necessary facilities and equipment. He is also of the opinion that presiding officers at these courts should undergo training to enable them to handle sexual offences against children with the sensitivity required. The need for a speedy trial is also emphasised.

30.3.3 The **Mpumalanga Provincial Government, Department of Local Government Housing and Land Administration** is of the opinion that when dealing with the present unsatisfactory position in the law of evidence, a bold step is required by Parliament as it did in enacting section 30 of the **Restitution of Land Rights Act**, Act 22 of 1994 by allowing a court to admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law. The Department is of the opinion that Parliament should intervene and simplify the rules of evidence regarding evidence by children in sexual offences cases against children.

30.3.4 The **Johannesburg Child Welfare Society** submits that-

the rules of evidence should be re-examined in the light of the specific dynamics of child sexual abuse. In situations where they fail to connect with the realities of child sexual abuse and are an obstruction to justice, then they should be changed.

30.4 Evaluation and recommendations

30.4.1 In the final analysis our law of evidence consists of a complex body of technical rules that serve to exclude evidence that would otherwise be admitted in a less stringent or free system of evidence. This results in complex legal arguments about the admissibility of evidence in trials within a trial and the unnecessary prolongment of matters. An easy way out would be to empower the court to admit all relevant evidence and thereafter to exercise a judicial discretion as to the weight that should be attached to such evidence.

30.4.2 Courts often automatically exclude evidence without questioning the reason for the existence of certain rules of evidence. The question which should be asked is whether the

current rules of evidence governing the conduct of sexual offence trials assist or hinder the truth-seeking process, and whether it is the most appropriate system with particular reference to the child victim of a sexual offence. From the submissions it is clear that there is a need to re-assess the applicability of the rules of evidence in general. Although the Commission is in favour of a general admission of relevant legally obtained evidence it has also found it necessary to consider each rule of evidence as well as the application thereof individually. Each rule relevant to the hearing of a sexual offence matter will be addressed in subsequent chapters.

30.4.3 The Commission is of the opinion that the function of the law of evidence is to guide the court to the correct decision. To decide whether a particular rule of evidence is fulfilling this function, it is also necessary to consider the nature and purpose of the proceedings before the court.¹² As will be pointed out below, some of the rules of evidence are inappropriate for sexual offence proceedings.

30.4.4 Accordingly the Commission recommends, as a ground rule, that all relevant evidence be admitted in sexual offence cases. The presiding officer should consider all such evidence and must use his or her judicial discretion as to the proper weighting to be given to such evidence.

¹² See further the Scottish Law Commission **Evidence: Report on Hearsay Evidence in Criminal Proceedings** (Scot Law Com No 149) at p3ff.

CHAPTER 31

THE CAUTIONARY RULES

31.1 Introduction

31.1.1 There is a long-established rule of evidence in both common law and Roman-Dutch law jurisdictions that judges are required to warn the trier of fact¹ of the danger of convicting on the uncorroborated evidence of certain categories of witnesses.² The so-called cautionary rule requires judges and juries to exercise extra caution before accepting the evidence of certain witnesses on the ground that such evidence is inherently potentially unreliable.³ The cautionary rule has evolved over a period of time largely as a consequence of the judiciary's own interpretation of the content of the rule as it is not coupled to a statutory obligation. The result is that the cautionary rule is not formally defined.

31.1.2 The cautionary rule traditionally applies to the evidence of the following witnesses:⁴

- Complainants in sexual offence cases;
- single witnesses;
- accomplices;
- children; and
- police informers.

The cautionary rules applicable to complainants in sexual offence cases, single witnesses and children will be discussed in this chapter.

¹ Judge and the jury, whichever is applicable.

² J Hatchard 'Abolishing the Cautionary Rule in Sexual Cases in Namibia' (1992) Vol 37 No 1 **J.A.L.** at pp 97.

³ Hoffman & Zeffert **The South African Law of Evidence** 3ed (1988) 572

⁴ Hoffman & Zeffert at 573 et seq; Schwikkard et al note 1 at 388 et seq.

31.2 Complainants in sexual offence cases

31.2.1 Current law

31.2.1.1 The cautionary rule in sexual offences theoretically applies to the evidence of female as well as male complainants⁵ in sexual cases. Practice seems to show that it is aimed more at the evidence of female victims of sexual offences. A few of the reasons advanced in support of the cautionary rule are that the rule is based on the principle that an allegation of rape is easy to make and difficult to refute; that the rule is based on the allegation that women in general have many motives to lie in sexual cases: to conceal consensual intercourse from strict parents, or because of embarrassment at having consented, or because the man has failed to pay her money; and that the rule is based on the principle that women are naturally prone to lie and to fantasise particularly in sexual matters. Wigmore advances the reason that 'their [women's] psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements, or abnormal instincts, partly by bad social environment, partly by bad temporary physiological or emotional conditions. One form taken by these complexes, is that of 'contriving false charges of sexual offenses by men...'.⁶ In **R v Rautenbach**⁷ Schreiner JA held that 'it is not only the risk of conscious fabrication which must be guarded against. There is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all.'

31.2.1.2 In 1985 the Commission explained the rationale for the application of a rule of caution to sexual offences as follows:⁸

Rape usually takes place in secret and it is easy to lay a false charge and difficult to refute it. Furthermore, a complaint could be motivated by an emotional reaction or spite, an innocent man may be falsely accused because of his wealth, the complainant may be forced by circumstances to admit that she had intercourse and then represent willing intercourse as rape.

⁵ **S v C** 1965 3 SA 105 (N) 108 as quoted by Schwikkard **Principles of Evidence** at pp390.

⁶ Wigmore **Anglo American System of Evidence in trials at Common Law** 3ed (1940) 3 par 924 (a) at 459

⁷ 1949 (1) SA 135 (A) at pp143.

⁸ South African Law Commission **Report on Women and Sexual Offences** (1985) at paragraph 3.55.

31.2.1.3 When called on to consider whether this rule should be retained specifically in relation to sexual offence cases, the Commission concluded that there was no need for reform in relation to this aspect of South African law.⁹ The Commission emphasized that, subject to the qualification that the rule must be 'correctly applied' and must not be elevated to a rule of evidence, those who applied it deemed it a necessary rule of practice which presented no problems to 'experienced presiding judges and magistrates'.¹⁰

31.2.1.4 Following the promulgation of the Constitution and more specifically the constitutional developments relating to the notion of equality before the law and the prohibition of unfair discrimination based on sex or gender,¹¹ the court's approach towards the automatic application of the cautionary rule received renewed interest .

31.2.1.5 In **S v M**¹² the appellant appealed against a conviction of rape in the Cape Provincial Division. He argued that the trial magistrate had not applied the cautionary rule in a satisfactory fashion. Davis AJ conceded that it was highly problematic 'to assume automatically that women lie about rape when approaching a court',¹³ but accepted (without any discussion of this point) that he was bound to apply the cautionary rule in this matter.¹⁴ Further, he found that:¹⁵

in applying the cautionary rule, a South African court must in terms of s 35(3) of the Republic of South Africa Constitution Act 200 of 1993, develop and apply the common law in terms of the spirit, purpose and object of the Constitution. For this reason the application of the cautionary rule shall not undermine the unequivocal constitutional commitment to gender equality.

⁹ South African Law Commission **Report on Women and Sexual Offences** (1985) at paragraph at 3.69.

¹⁰ South African Law Commission **Report on Women and Sexual Offences** (1985) at paragraph at 3.51.

¹¹ Section 9 of the Constitution.

¹² 1997 (2) SACR 682 (C).

¹³ at 685D.

¹⁴ at 685E.

¹⁵ at 685H-I.

He therefore directed that the application of this rule in sexual offence cases should be evaluated carefully so as not to deter a complainant 'from coming before a court to tell her story truthfully and ensure that justice is done'.¹⁶ He found that in the circumstances of the case, there was no evidence that suggested an improper motive as to why the complainant should not have told the truth, and consequently did not see any reason for disturbing the magistrate's finding.

31.2.1.6 Shortly thereafter the Supreme Court of Appeal was presented with an opportunity to re-examine the application of the cautionary rule. In **S v Jackson**,¹⁷ the appellant, convicted of attempted rape in the regional court, appealed unsuccessfully to the Cape Provincial Division against his conviction and sentence, and then approached the Supreme Court of Appeal. He contended, amongst other things, that the trial court had misdirected itself in not effectively applying the cautionary rule in respect of the evidence of the complainant. The prosecution disagreed, and also argued that the basis, meaning and ambit of the cautionary rule in sexual offence cases should be revisited, since this rule was 'discriminatory against women, should not be countenanced, is unnecessary and unfairly increases the burden of proof resting on the State in cases involving sexual offences'.¹⁸

31.2.1.7 Olivier JA, on behalf of a unanimous court, agreed with the prosecution's argument that the notion that women are habitually inclined to lie about being raped was without any basis, and that the reliance on the strength of 'collective wisdom and experience' for the perpetuation of the rule was, at best, suspect.¹⁹ Interestingly, the court conceded that the rule affected the State's burden of proof - which goes against the view expressed in the 1992 judgment in **S v M**.²⁰

31.2.1.8 Olivier JA then proceeded to examine the position in other legal systems where the cautionary rule and its variations had been abolished, and came to the following

¹⁶ at 685E-F.

¹⁷ 1998(1)SACR 470 (SCA); also reported as **S v J** 1998 (2) SA 984 (SCA).

¹⁸ at 473J-474A.

¹⁹ at 474H.

²⁰ at 193D.

conclusion²¹

In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of the accused beyond reasonable doubt - no more and no less. *The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.*

31.2.1.9 The court thus removed the 'obligation' resting on a presiding officer to regard the evidence of complainants in sexual offence cases with caution merely because of the nature of the offence. Olivier JA²² commended as particularly important the eighth guideline formulated by Lord Taylor CJ in the recent English judgment in **R v Makanjuola; R v Easton**²³

In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

Olivier JA concluded that the magistrate had not been obliged to apply such cautionary rule and dismissed the appeal.

31.2.1.10 In **S v M**²⁴ (unrelated to the aforementioned case), the Supreme Court of Appeal reiterated that the application of the cautionary rule was based on irrational and outdated perceptions. It again pointed out that although the evidence in such cases might call for a cautionary approach this was not a general rule. The State was simply obliged to prove the accused's guilt beyond a reasonable doubt. The Court also found that the factors which motivated the Court in **Jackson's** case to dispense with the cautionary rule in sexual assault cases, applied with equal force to all cases in which an act of a sexual nature was an element,

²¹ at 476E-F. Emphasis added.

²² **R v Makanjuola, R v Easton** note 24 at 733C-D.

²³ [1995] 3 All ER 730 (CA).

²⁴ 1999 (2) SACR 548 (SCA).

such as the offence of incest.²⁵ The effect of this judgement is that the general cautionary rule relating to sexual offences is now expressly not applicable to sexual offence cases involving children even in sensitive cases where the offence is committed by a family member.

31.2.1.11 **S v M**²⁶ (also unrelated to the aforementioned case) confirmed the demise of the cautionary rule in our law. Shakenovsky AJ held that:

This matter has now once and for all been settled in the Supreme Court of Appeal. The old cautionary rule which existed as a general rule with regard to a complainant's evidence in a case involving sexual assault is no longer our law and has been relegated to the limbo of much distinguished principles.

31.2.1.12 Shakenovsky AJ stated that "I do not, as has been enjoined in the **Jackson** case, apply any general cautionary rule to the complainant's evidence merely because this is a rape case. I look at the evidence as a whole and the reliability of what has been placed before me."²⁷ According to Shakenovsky AJ the correct approach to be adopted in trying to evaluate the set of facts before the court is to be found in the judgment in the English court of appeal in **R v Makanjuola, R v Easton**²⁸ were the following is stated-

The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a Judge should deal with them. But it is clear that to carry on giving "discretionary" warnings generally and in the same terms which were previously obligatory would be contrary to the policy and purpose of the 1994 Act. (This was the statute relevant to this matter in England). Whether, as a matter of discretion, a Judge should give a warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The Judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the Judge may suggest it would be wise to look for some supporting material for acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which Judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury.

²⁵ at 555A-B.

²⁶ 2000 (1) SACR 484 (W).

²⁷ **S v V** at pp501.

²⁸ 1995 3 All ER 730 (CA).

31.2.2 Comparative analysis

31.2.2.1 It is significant to note that the application of the cautionary rule in sexual offence cases has been abolished in a number of foreign jurisdictions. This rule was typically expressed in other systems (depending on the nature of the specific system) as a judicial duty either to regard the evidence of complainants in sexual offence cases with caution, or to warn the jury about the dangers associated with basing the conviction of a person who is accused of a sexual offence solely on uncorroborated evidence given by the complainant.

31.2.2.2 Namibia

31.2.2.2.1 The application of the cautionary rule in sexual offence cases has in recent years been the subject of judicial scrutiny on a number of occasions. In **S v D**²⁹ the Namibian High Court, per Frank J, criticized the application of the cautionary rule in sexual offence cases for its irrationality, based on the absence of any empirical evidence that false charges are laid more frequently in sexual offence cases than in any other criminal cases.³⁰ The judge also pointed out that the vast majority of complainants in sexual assault cases are women, and added:³¹

. . . I am of the view that the so-called cautionary rule has no other purpose than to discriminate against women complainants. This rule thus probably also is contrary to art 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex.

31.2.2.2.2 As set out above, the comments made by Frank J in **S v D** suggested that the application of the cautionary rule in rape cases was inconsistent with constitutional provisions. However, because of the fact that these statements were made *obiter*, this judgment did not have the effect of 'abolishing' the cautionary rule in rape cases.

31.2.2.2.3 In **S v Katamba**³² the Supreme Court of Namibia, per O'Linn AJA, found that

²⁹ 1992 (1) SA 509 (NmHC).

³⁰ at 516A.

³¹ at 516H.

³² 2000 (1) SACR 162 (NmS).

although the sentiments expressed in **S v D** regarding the cautionary rule were *obiter dicta* it constituted a valuable guideline which should be considered by any other Court considering the issue and particularly when deciding the issue in a binding judgement. Judge O'Linn found that it would be in the interests of justice for the Supreme Court to lay down clear guidelines on the issue. In deciding the fate of the cautionary rule, O'Linn AJA stated that the decision in **S v D** was persuasive authority, particularly because it was a decision after the Namibian Constitution had come into force. He also referred to the fact that the decision in **S v D** had been referred to with approval in the South African Supreme Court of Appeal in the case **S v Jackson**. It was found that even though not binding in Namibia the later case has strong persuasive force.

31.2.2.2.4 In arriving at the conclusion that "the cautionary rule in sexual cases should not be applied by courts in Namibia",³³ he stated the following:

. . . the rule has outlived its usefulness. There are no convincing reasons for its continued application. The constitutional requirement contained in art 12 of the Namibian Constitution, that the accused is presumed innocent until proved beyond reasonable doubt to be guilty, once again reiterates and reinforces a fundamental principle of our criminal law and procedure. This principle, together with cautionary rules regarding the evidence of youthful witnesses, particularly children and the evidence of single witnesses, would in the normal run of cases afford sufficient protection to the innocent accused. The additional burden of the application of the cautionary rule may adversely infringe on the fundamental rights, which include a fair trial also in regard to such victims' rights and interests.

31.2.2.2.5 In keeping with the judicial developments in this regard, section 5 of the **Combating of Rape Act**, 2000 (Act no 8 of 2000) abolishes the cautionary rule relating to offences of a sexual or indecent nature. Section 5 reads as follows:

No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.

31.2.2.3 **England**

31.2.2.3.1 Section 32(1) of the **Criminal Justice and Public Order Act** (1994) abolished the obligation to warn a jury about convicting the accused on the uncorroborated evidence of a person merely because that person is a complainant in a sexual offence case. It should be

³³ at pp 177.

noted that this provision removes the obligation to give a warning of caution to the jury in sexual offence cases, but still leaves a *discretion* to do so.

31.2.2.3.2 This distinction was canvassed in detail in the judgment in **R v Makanjuola, R v Easton**³⁴ which was handed down after the above legislative amendments. Lord Taylor CJ stated that to carry on giving ‘discretionary’ warnings to the jury in the same way that the previously obligatory warnings had been given would be contrary to the policy and purpose of the enactment of section 32(1) of the 1994 Act. Whether judges should exercise their discretion to give any warning, and if so, the strength and terms of the warning, must depend on the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. The judge may often decide that no special warning is required at all.³⁵

31.2.2.4 **Canada**

31.2.2.4.1 Section 274 of the **Criminal Code of Canada** states that where an accused is charged with a sexual offence no corroboration is required for a conviction. This section also provides that the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

31.2.2.4.2 Notwithstanding this section, the trial judge still has a discretion when reviewing the facts with a jury to discuss the weight they may see fit to attach to the unsupported evidence of the complainant.³⁶

31.2.2.5 **Australia**

31.2.2.5.1 All Australian States and Territories have introduced legislation stating that a judge in a rape trial is not obliged to warn the jury about the need for corroboration of a complainant’s evidence.³⁷

³⁴ **R v Makanjuola, R v Easton** note 24.

³⁵ at pp732.

³⁶ See, for example, **R v Saulnier** (2 March 1989) . Unreported (NSCA).

³⁷ Australian Capital Territory: sec 76F of the **Evidence Ordinance**; South Australia: sec 341 of the **Evidence Act**; Tasmania: sec 316 of the **Criminal Code**; Western Australia: sec 50 of the **Criminal Code Act**; Victoria: s 51 of the **Crimes Act**; New South Wales: sec 450C of the

31.2.2.5.2 The Australian High Court has commented that these provisions abolished the requirement to give a warning to the jury, but not a judge's discretion to comment on the circumstances of the case. Brennan J explained as follows:³⁸

No longer may the judge tell the jury that it is dangerous to convict in the circumstances... because the experience of the courts has shown it to be so, but the judge may invite the jury in sexual cases (as is done in other criminal cases) to make their own evaluation of the alleged victim's evidence in the light of common human experience . . .

31.2.2.5.3 Bargaen and Fishwick argue that an examination of recent cases where judges had deemed a warning to the jury necessary, reveals that despite the clear messages of new legislation, judicial scepticism towards the credibility of women complainants still prevails.³⁹

31.2.3 Submissions

31.2.3.1 A few respondents were in favour of the retention of the cautionary rule in sexual offence cases. Without substantiating their viewpoints, **Prof C R Snyman** of **UNISA** and **Mataeke Ramanstsi** of **SASPCAN** state that they are of the opinion that there is a need for this rule of evidence. In arguing for the retention of the cautionary rule in sexual offence cases **Collet Wagner** of the **Department of Welfare and Population Development**, opines that the application of the cautionary rule should be considered together with a panel of child care experts. **Ms Blumrick** of the **Attorney General's Office** in **Pietermaritzburg**, opines that many of the problems encountered in practice with the cautionary rules will be solved with the training of magistrates and prosecutors. **Mr P Nel**, a prosecutor in **Port Elizabeth**, agrees and adds that the magistrate concerned must apply his mind and not let caution overrule common sense. Another respondent stated that it is just one of the factors a Judge should consider in weighing up the evidence.⁴⁰

31.2.3.2 A large number of respondents indicated that they were opposed to the retention

Crimes Act.

³⁸ **Longman v R** (1989) 168 (CLR) 79 at 87.

³⁹ Jenny Bargaen and Elaine Fishwick **Sexual Assault Law reform: A National Perspective** (1995) at 72.

⁴⁰ **Association for Persons with Physical Disabilities, Northern Cape.**

of this cautionary rule.⁴¹ Respondents from the **University of the Western Cape, Community Law Centre**, argue that the cautionary rule in sexual offence cases is unconstitutional as it is contrary to the right to equality before the law. They opine that the establishment of credibility with regard to evidence of **all** witnesses is the first work of the court. Further that the need to exercise “caution” because of the secrecy of rape is already covered by the cautionary rule relating to single witnesses. The accused is protected by the requirement that the allegations must be established “beyond reasonable doubt”. If convicted the accused has recourse to appeal and review proceedings. They note that the victim, not being a party to the dispute, has no recourse in the event of an acquittal based on factual considerations. They also draw attention to the fact that research in both New Zealand and the United States of America has shown that very few false charges of rape are laid. It is also well documented that under-reporting of rape is one important reason for the perpetuation of sexual violence. **Ms Clark**, a **senior public prosecutor** in **Verulam**, agrees that the cautionary rule in sexual offence cases should not be retained and that in any case involving a single witness (as is usual in rape) there is already the safeguard of a cautionary rule. She also states that, this, if applied properly by requiring proof beyond a reasonable doubt, should be safeguard enough.

31.2.3.3 Respondents from various units of the **South African Police Services**,⁴² opine that none of the cautionary rules should be part of our law in relation to sexual offences either because it contributes to secondary trauma or the fact that the cautionary rule raises a question of doubt. It is contended that this is often used by the defence as a loophole and that successful prosecutions are often hijacked by the application of the cautionary rules to a particular witness’s evidence. Similarly **Tshwaranang Legal Advocacy Centre** submits that the cautionary rules are based upon fallacious reasoning and have no merit in the light of modern psychiatric evidence of rape trauma syndrome and other psychological phenomena. It is further contended that the application of these ‘rules’ discriminates against women on the basis of sex and gender, and children on the basis of age. The respondent concludes that in the light of the equality clause, these rules are unconstitutional.

⁴¹ **South African National Council for Child and Family Welfare, Vryheid Child and Family Welfare Society, Mr K Worrall-Clare, Mr van Dokkum, Dr d’Oliviera, Ms Clark and Ms Madonsela.**

⁴² **SAPS Welfare Services (Head Office), SAPS Area Commissioner Johannesburg, SAPS Provincial Commissioner Serious Violent Crime Kwa-Zulu Natal, SAPS Office of the Unit Commander Child Protection Unit East Rand, SAPS Area Commissioner Legal Services East Rand.**

31.2.3.4 **Mr van Dokkum** states that the cautionary rules have survived the abolition of the jury for whose benefit they were formulated. He also makes the point that all three cautionary rules may apply in a case of sexual abuse of a child and that it creates an insurmountable obstacle in the path of a successful prosecution. **Dr d'Oliviera** is in agreement and states that when these rules are applied cumulatively, a conviction becomes well-nigh impossible. **Mr van Dokkum** continues his criticism of the cautionary rules by stating that it can be forcefully argued that the cautionary rules, as they relate to children and sexual complainants, have no empirical or logical basis and are rather based on antiquated notions that children are incompetent and that they, along with women, are prone to making false allegations of sexual abuse. He concludes by stating that any argument that supports their continued application and the limitation on the rights of sexual complainants (the majority being women) and children, that results from their application as a justifiable limitation would have to be based on the same outmoded and fallacious notions concerning women and children and therefore should fail.

31.2.3.5 **Mr K Worrall-Clare** provided the Commission with an extensive document dealing with the cautionary rule pertaining to child victims. He submits that there is no evidence to support the belief that certain categories of persons are less reliable than any other witness. If anything there is evidence to suggest the opposite. He concludes by supporting the notion that the rules should be abolished and no longer form part of our law.

31.2.4 **Evaluation and recommendations**

31.2.4.1 The basis of the objections against the cautionary rule in sexual offence cases is primarily that its use rests on the assumption that complainants in sexual offence cases and particularly female complainants have an 'innate' inclination to lie in matters relating to sexual offences.⁴³ This contention, which has found no empirical support in studies comparing the prevalence of false claims in sexual offence cases with those in other criminal offences,⁴⁴ is based on nothing more substantial than the age-old stereotyping of women.

⁴³ Schwikkard note 36 at 207.

⁴⁴ Diane Hubbard 'A critical discussion of the law of rape in Namibia' in Susan Bazili (ed) **Putting Women on the Agenda** (1991) 34.

31.2.4.2 It is also contended that the cautionary rule is based on the principle that an allegation of a sexual offence is easy to make and difficult to refute. On the contrary the opposite seems to be true. An allegation of a sexual offence is not easy to make. A sexual offence victim is often blamed for the crime, for example people may refer to the clothes the victim was wearing at the time the offence was committed and say “she must have asked for it”.⁴⁵

31.2.4.3 A further objection is that although the rule is framed in gender-neutral terms (it also applies where the complainant in a sexual offence case is a man), experience has shown that the vast majority of complainants in these cases are women.⁴⁶ The rule thus operates to disproportionately affect women as a group (thus providing a classic example of ‘indirect’ and systemic discrimination against women).

31.2.4.4 Jagwanth and Schwikkard⁴⁷ present a lucid analysis of the cautionary rule in sexual offence cases within the framework of the recent series of Constitutional court judgments on gender equality. They conclude that the application of the cautionary rule in sexual offence cases is irredeemably inconsistent with the equality provisions.⁴⁸ Further that the 1996 Constitution, with its use of a more powerful injunction to shape the common law in accordance with the Bill of Rights, should provide the impetus for the courts to be more proactive in the fashioning of the common law.⁴⁹

31.2.4.5 As stated above the Supreme Court of Appeal⁵⁰ has removed the *obligation* to treat evidence of victims of sexual offences with caution, though the *discretion* to do so remains.

⁴⁵ A Armstrong ‘Evidence in Rape Cases in Four Southern African Countries’ (1979) J.A.L Vol 33 No 2.

⁴⁶ Compare Frank J’s estimate in **S v D** note 8 that in at least 95% of the cases involving sexual assault heard in the Namibia High Court during 1990 the complainants were women - at 516G-H.

⁴⁷ Jagwanth and Schwikkard ‘An unconstitutional cautionary rule’ (1998) **SACJ** 87-96.

⁴⁸ Jagwanth and Schwikkard ‘An unconstitutional cautionary rule’ (1998) **SACJ** at 94.

⁴⁹ Jagwanth and Schwikkard ‘An unconstitutional cautionary rule’ (1998) **SACJ** at 96.

⁵⁰ **S v Jackson** 1998 (1) SACR 470 (SCA).

The guideline given for the exercise of the discretion, taken from the **Makanjuola** judgment, is that there needs to be an evidential basis for suggesting that the evidence of the witness may be unreliable (thus requiring a cautionary approach). This approach holds the danger that the requirement of an 'evidential basis' for suggesting unreliability may serve to broaden the issues in dispute, leaving room for the introduction of evidence, for instance, on the previous sexual history of the complainant. Such evidence, which might otherwise have been irrelevant, would be saved from inadmissibility because of its potential utility in establishing that the evidence of the witness should be approached with caution.

31.2.4.6 Olivier JA's⁵¹ suggestion that the evidence in a 'particular case' may call for a cautionary approach is somewhat unclear, since it is not immediately apparent from the judgment whether this specifically refers to sexual offence matters (which appears to be the case from the context), or whether this is a broader rule applying in all criminal cases. The latter interpretation implies that in any criminal matter there may be aspects which suggest that caution is advisable (for example, that the witness is a single witness, or that the quality of evidence is not satisfactory). This general approach is followed in the evaluation of evidence.

31.2.4.7 However, the alternative which becomes apparent from the reading of Judge Olivier's *dictum* is that there are certain sexual offence cases where caution should apply *because of the nature of the case*. This version is, with respect, problematic, since it leaves judges or magistrates with a very broad discretion as to whether or not a particular case warrants this cautionary approach. In essence, this implies that a 'residual' cautionary rule may still apply in sexual offence matters.

31.2.4.8 It is unclear whether the intention in **S v Jackson** was to 'abolish' the cautionary rule or to redefine it. Following a careful reading of the judgement it seems to merely reformulate the existing rule. In effect, in certain circumstances victims of sexual offences will be treated with caution in the same way as accomplices to the crime itself are.

31.2.4.9 The cautionary rule in sexual cases is confusing in itself, and therefore leads to uneven interpretation. The court is first required to believe the complainant, and then to search for reasons not to believe the complainant. The cautionary rule, in effect, places a victim of sexual assault in an unequal position in that their evidence is viewed as suspect and the

⁵¹ **S v Jackson**.

offender's evidence is viewed with an open mind. No scientific, reasonable or justifiable basis for the retention of this cautionary rule could be found.

31.2.4.10 Accordingly it is recommended that this rule should be abolished. It is recommended that a clause providing for the abolition of the cautionary rule in sexual offence cases should be included in the Sexual Offence Act.

31.3 Child witnesses

The evidence of children is as a rule viewed with caution. This was stated in **S v Manda**⁵² as “the imaginativeness and suggestibility of children are only two of a number of reasons why the evidence of children should be scrutinized with care, amounting perhaps to suspicion.” This is a general rule and applies to civil cases as well. It would seem that the underlying need for the cautionary approach is based on the courts' inherent fear of the child's ability to “make up the story”⁵³ or to fabricate details relating to an act of abuse which could not be remembered.⁵⁴

31.3.1 Current law

31.3.1.1 No statutory requirement exists whereby a child's evidence must be corroborated. Yet it has long been accepted that the evidence of young children should be treated with caution,⁵⁵ and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach.⁵⁶

31.3.1.2 As is stated above, there is no definition of or fixed criteria for this cautionary rule to serve as a benchmark. The interpretation of and extent of application of this rule is entirely within the discretion of the presiding officer in a particular case.

⁵² 1951 (3) SA 158 (A)

⁵³ **R v Bell** 1929 CPD 478 at 480.

⁵⁴ For example, the identity of the perpetrator.

⁵⁵ **R v Manda** 1951 (3) SA 158 (A) at 163 C; **Woji v Santam Insurance Co Limited** 1981 (1) SA 1020 (A) at 1028 B - D.

⁵⁶ **S v J** 1998 (2) SA 984 (SCA) at 1009B.

31.3.1.3 In **S v V**⁵⁷ the Supreme Court of Appeal held that “whilst there is no statutory requirement that a child’s evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. Such a cautionary approach is called for where reasonable grounds are suggested by the accused for suspecting that the State’s witnesses have a grudge against him, or a motive to implicate him falsely.”

31.3.1.4 In **S v Vumazonke**⁵⁸ Jali J found that “the only evidence regarding the rape is that of the (child) complainant.⁵⁹ The court held that it is trite law that the cautionary rule applies in respect of both a child witness and a single witness.⁶⁰ Further that “it is trite law that a child can easily be influenced. Psychological research has shown, amongst others, that children are suggestible. Children do have a propensity to give an answer other than the one he knows to be correct because it suits him or her to do so.” However with reference to **S v S**, Jali J failed to add that Ebrahim JA also stated that “reliable psychological research shows that children, like adults, can certainly be suggestible” and that “the degree of suggestibility can be minimised by questions especially designed to overcome known pitfalls.”⁶¹

31.3.2 Comparative analysis

31.3.2.1 Canada

31.3.2.1.1 Canadian law has rejected the cautionary rule when considering the evidence of children. In the Canadian case of **R v W**⁶² Judge McLachlin notes that “[t]he law concerning the evidence of children has undergone two major changes in recent years. First, the notion that the evidence of children was inherently unreliable and therefore to be treated with special caution has been eliminated. Thus various provisions requiring that a child’s evidence be corroborated have been repealed. Second, there is a new appreciation that it may be wrong

⁵⁷ 2000 (1) SACR 453 (SCA).

⁵⁸ 2000 (1) SACR 619 (C).

⁵⁹ It is worth pointing out that the child was mildly retarded.

⁶⁰ At pp 624.

⁶¹ At pp 56.

⁶² (R), [1992] 2 SCR 122 at 123 per McLachlin, J

to apply adult tests of credibility to the evidence of children. While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but a common sense basis, taking into account the strengths and weaknesses which characterise the evidence offered in a particular case..." The Court of Appeal found *in casu* that the court "went too far in this case in finding *lacunae* in the evidence which did not exist and in applying a stringent, critical approach ... It appears to have been influenced by the old stereotypes relating to the inherent unreliability of children's evidence and the "normal" behaviour of victims of sexual abuse."⁶³

31.3.2.2 **Zimbabwe**

31.3.2.2.1 As regards the acceptance of children's evidence, the Zimbabwean Supreme Court⁶⁴ held that the liberal rules governing the acceptance of children's evidence imposed a duty on the court to be cognisant of potential objections to the evidence of children which may or may not be valid according to the facts and circumstances of each case. The Court evaluated six main objections to relying on children's evidence, viz that (a) children's memories are unreliable; (b) children are egocentric; (c) children are highly suggestible; (d) children have difficulty distinguishing fact from fantasy; (e) children make false allegations, particularly of sexual assault; and (f) children do not understand the duty to tell the truth. The Court found that these objections had no merit and particularly with regard to objection (d) that children do not fantasise over things beyond their own direct or indirect experience; and with regard to objection (f) that the belief that children do not understand the duty of telling the truth was a sweeping statement which ignored differences in age, intelligence and morality between children. The court found it fit to refer to the age of the complainant only with regard to the imposed sentence.

31.3.3 **Submissions**

31.3.3.1 As the focus of the Commission's sexual offence project at the issue paper stage was specifically on children, the submissions relating to the cautionary rule in sexual offence

⁶³ Had this case happened in South Africa it is unlikely that there would have been a conviction as the child could not give evidence as a result of a lack of understanding what had happened to her and the only evidence available was hearsay.

⁶⁴ **S v S** 1995 (1) SACR 50 (ZS).

cases should be read together with the submissions on the cautionary rule relating to children. The cumulative response is that these rules should not be retained in view of the fact that the cautionary rule relating to single witnesses provides adequate protection for the accused. In the absence of a direct question regarding the cautionary rule applicable to children a few respondents still verbalised their dissatisfaction with the effect that this rule has on the evidence given by children in sexual offence cases. **Dr d'Oliviera** explains that in the case of a child complainant, testifying with regard to a sexual offence, also being a single witness, three different cautionary rules find application and when applied cumulatively, a conviction becomes well-nigh impossible. He tentatively opines that some legislative measure is perhaps called for. **Dr R Potgieter** agrees by stating that a further obstacle that virtually precludes justice to be done in cases of child sexual abuse, is the assumption prevailing in many academic and legal circles that the accused is the victim, in the sense that sexual abuse is mostly the product of the fantasies of the child, or that children will make a statement of sexual abuse against an adult for vindictive purposes. She continues by saying that the legal procedures, the practical situation in the judicial system and the mind set of many professionals in the field of combating child sexual abuse, are such that odds are heavily stacked in favour of the perpetrator and against the child. She concludes by averring that the probability that the best interests of the child could be served under these circumstances seems to be close to nil.

31.3.3.2 **Tshwaranang** states that the application of this rule discriminates against children on the basis of age and that the entire body of cautionary rules are responsible for the fact that women and girls do not and will continue to not report rapes. **Neil van Dokkum** argues that the cautionary rules relating to children and sexual complaints have no empirical or logical basis and are rather based on antiquated notions that children are firstly incompetent and that they, along with women, are prone to making false allegations of sexual abuse. He opines that the interests of the accused are still secured by the cautionary rules regarding single witnesses and identification evidence, both of which are empirically defensible. He concludes by stating that it might be time to take leave of these outdated principles which are in any event discriminatory on the grounds of age and sex. Further that any argument that they constitute a justifiable limitation would have to be based on the same outmoded and fallacious notions concerning women and children and therefore should fail.

31.3.3.3 **The Disabled Children's Action Group (DICAG)** highlights the fact that these rules of evidence often work together to deny justice to disabled children. They illustrate their point by using the example of a young disabled child who had allegedly been the victim of

incest. The court found that it could not proceed to trial because the child's testimony had too many inconsistencies even though her mother explained that her child's testimony was consistent, but her speech and thought pattern was different from other people. **DICAG** contend that it is a giant loophole for people who abuse and exploit people with disabilities and especially children with disabilities as they think that the person is not going to be believed anyway.

31.3.3.4 **Ms W L Clark** submits that some form of caution must be exercised when dealing with a child witness, as in her opinion children are subject to suggestibility and may misinterpret something which they see or which is done to them. She concludes that subject to the right amount of caution being used, the test should be the same as the test used for any other single witness: that he or she must be competent.

31.3.3.5 However, **Mr P Nel**, a prosecutor in the Port Elizabeth Magistrate's office states that the cautionary rule should still be retained as developed via our case law. He states that the problems regarding this rule lie not in the rule itself but rather in its application and therefore it still has a role to play. He further suggests that the magistrate concerned must apply his mind and not let caution overrule common sense. **Sr Potter** of the Agape C.P. School also opines that this rule of evidence is essential with children.

31.3.3.6 The Issue Paper elicited specific response relating to the need for corroboration of evidence when dealing with sexual offences against children. **Adv Songca** submits that the courts should apply a case by case approach. For instance, it should determine the entire make up of the child and determine whether the child is mature enough to distinguish fact from fantasy and appreciates the importance of being truthful. Further that corroboration should only be insisted upon if the court is of the view or suspects that the child might have been coached.

31.3.3.7 Without elaborating a few respondents opine⁶⁵ that the need for corroboration still exists. A combined questionnaire by the **South African National Council for Child and Family Welfare** states that corroborative evidence should only be one of the factors that should be considered by a judge or presiding officer in weighing up the evidence. **Tshwaranang** is of the viewpoint that rape charges are difficult to make and even more difficult to prove. Further that the philosophy that 'charges of rape are easily made and difficult to prove' has discouraged

⁶⁵ **The Serious Violent Crime Unit: Kwazulu Natal; Mataeke Ramantsi (SASPCAN).**

many people from filing forth rape charges, and when they have, from successfully obtaining convictions. **Tshwaranang** concludes that the corroboration rule should be abolished. If it is possible for an accused to be convicted on the credible testimony of a single witness in other cases, then it should be possible in rape cases too. The focus of the judge should be in assessing the reliability and credibility of the witness. **Mr K Worrall-Clare** agrees that effect should rather be given to section 208 of the **Criminal Procedure Act** (relating to single witnesses) and that presiding officers should avoid the rigid insistence on corroboration.

31.3.4 Evaluation and recommendations

31.3.4.1 Until recently, it was believed that children had poor memories, were untrustworthy and were incapable of discerning fact from fantasy.⁶⁶ Children who asserted that they had been sexually, physically or psychologically abused were not considered to be credible. Judges were instructed to warn jurors regarding the unreliability of children's testimony. In a 1962 decision, the Supreme Court of Canada stated that the following faculties were underdeveloped in children: their capacities to observe, to recollect, their moral capacity and their ability to understand questions and frame intelligent answers.⁶⁷

31.3.4.2 In the sexual abuse cases that come before our courts, children are obliged to overcome significant legal obstacles in order to testify. Unlike their adult counterparts, children are required to convince the judge that they understand the meaning of the oath in order to give sworn testimony (this will be dealt with in a following chapter). Thereafter they face the sometimes insurmountable task of having their testimony believed. Presiding officers mostly insist that the testimony of children be corroborated in both civil cases and criminal prosecutions. In sexual offence matters this is rarely possible as children are generally abused in secret, without the presence of other witnesses to substantiate the child's evidence.

31.3.4.3 In recent years research has been published that challenges the conventional views regarding the unreliability of children's testimony. Psychiatrists and psychologists demonstrated in empirical studies that the memory of children is as accurate as that of adults,

⁶⁶ B.W. Boat and M.D. Everson, "When the tail wags the dog: The Response to Legal Challenges of the Credibility of Children's Allegations of Sexual Abuse" (1990) 13 **The Child, Youth and Family Services Quarterly** (American Psychological Association at 2.).

⁶⁷ **R v Kendall** (1962), 132 C.C.C. 216 (S.C.C.), [1962] S.C.R. 469.

that children do not lie more than adults, and that children can discern fact from fantasy particularly in the context of acts of abuse.⁶⁸

31.3.4.4 With reference to Spencer and Flin⁶⁹ the Zimbabwean Supreme Court *per* Ebrahim JA⁷⁰ lists six of the traditional objections to relying on children's evidence, viz:⁷¹

- children's memories are unreliable;
- children are egocentric;
- children are highly suggestible;
- children have difficulty distinguishing fact from fantasy;
- children make false allegations, particularly of sexual assault;
- children do not understand the duty to tell the truth.

The court analysed the rationale of each of these objections and arrived at the conclusion that a new and more specific approach to cases involving children was called for. The court held that in approaching such cases with a single-minded eye towards seeking corroboration, the courts tended to lose sight of the reasons for seeking it. The court could not find justification for any one of the above objections.

31.3.4.5 Although there is no requirement as a matter of law that the evidence of children has to be corroborated, in practice some form of corroboration is routinely required. As is stated above the burden becomes greater when the child happens to be a single witness in a case relating to a sexual offence matter. If one looks at the classic motivations underlying the cautionary rule pertaining to children Combrinck⁷² questions whether these objections can still be held to be true. She answers this question by finding that-

⁶⁸ D.J. Fote, "Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform" (1985), 13 *Pepperdine L.Rev.* 157; as quoted by the Law commission of Canada at <http://www.lcc.gc.ca/en/papers/rapport/besrep/besrepintroduction.html>.

⁶⁹ **The Evidence of Children** Blackstone Press 1990 at 238.

⁷⁰ **S v S** 1995 (1) SACR 51 (ZS).

⁷¹ As quoted by Helene Combrinck 'Monsters under the bed: challenging existing views on the credibility of child witnesses in sexual offence cases' (1995) 8 **SACJ** at 327.

⁷² At 328.

in the face of empirical research results indicating that there is very little reason to assume that children are *per se* more unreliable than adults, it is no longer sufficient to reply that the cautionary rule 'has been developed over many decades and is founded on the practical experience of legal practice: a re-assessment of the application of this rule is urgently called for.

31.3.4.6 There is no proof that children are prone to lie more than adults, that they have more sexual fantasies than adults or that they have more motive than adults to lay false charges. In fact, an experiential observation of the *police judiciaire* special unit, the *Brigade de Mineurs*, (the first police officers in France to investigate claims of sexual assault against a child) state that the question of lies and fabrication arises only in exceptional circumstances, and usually when the minor has run away from home and invents an assault to cover up his or her first sexual experience. In these cases it is usually relatively easy to distinguish between lies and truth.⁷³

31.3.4.7 The approach followed in **S v S** is 'refreshingly pragmatic'⁷⁴ and the motivation for change by Combrinck convincing. She concludes her argument by stating that the potentially beneficial effect of the appointment of intermediaries and the use of closed-circuit television systems will be nullified by a persistent adherence to the cautionary rule in its current form.

31.3.4.7 **The Commission shares these sentiments and therefore recommends that the cautionary rule relating to children should be abolished unequivocally. It is clear that an awareness of recent advances in the discipline of psychology and the application thereof are prerequisite to reaching an 'intelligent conclusion'⁷⁵ regarding the evidence of children. As the cautionary rule relating to children is so entrenched in the daily application of law in our courts it is recommended that the Sexual Offence Act should clearly state that this rule should no longer be applied.**

31.4 Single Witnesses

⁷³ Judge Herve Hamon **The Testimony of the child victim of intra-familial sexual abuse** Children's Evidence in Legal proceedings An International perspective Papers from an international conference Selwyn College Cambridge, edited by J R Spencer, G Nocolson, R Flin & R Bull

⁷⁴ PJ Schwikkard 'Recent cases' (1995) 8 **SACJ** 93 as quoted by Combrinck.

⁷⁵ **S v S** at 60 B-C.

31.4.1 Current Law

31.4.1.1 No statutory requirement exists in terms of which a single witness's evidence must be corroborated. The contrary is actually true, section 208 of the **Criminal Procedure Act** 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness.⁷⁶ Yet relying exclusively on the sincerity and perceptive powers of a single witness has evoked a judicial practice that such evidence should be used with the utmost care.⁷⁷ The common law rule provides that the evidence of a single witness must be viewed with caution.

31.4.1.2 In discussing the cautionary rule relating to single witnesses Du Toit *et al*⁷⁸ refer to the Appellate Division decision in **S v Webber**⁷⁹ where Rumpff JA, after examining the cases concluded as follows -⁸⁰

Dis natuurlik onmoontlik om •• formule te skep waarvolgens elke getuie se geloofwaardigheid vasgestel kan word, maar dit is noodsaaklik om met versigtigheid die getuienis van 'n enkele getuie te benader en om die goeie eienskappe van so 'n getuie te oorweeg tesame met al die faktore wat aan die geloofwaardigheid van die getuie kan afdoen.

The above authors continue their discussion by criticizing a later Appellate Division case⁸¹ where the court referred to the cautionary rule relating to single witnesses in that the said court found that "the section should only be relied upon where the evidence of the single witness is clear and satisfactory in every material respect, and that the section should therefore not be invoked where, for instance, the witness has an interest or bias adverse to the accused". Du Toit *et al* conclude that the correct approach is followed in subsequent cases, namely **S v Sauls**

⁷⁶ The Oxford dictionary defines the word competent as *inter alia* "(h)aving adequate ability" and "knowledge". The predecessor to section 208, the old section 256 provided that the single witness must be both competent and credible. The omitted word is defined in the Oxford dictionary as "worthy of belief, sufficiently likely to be believable".

⁷⁷ Du Toit *et al* **Commentary on the Criminal Procedure Act** 1993 Cape Town: Juta at 24-1.

⁷⁸ At 24 - 2.

⁷⁹ 1971(3)SA 754 (A).

⁸⁰ At 758G-H.

⁸¹ **S v French-Beytagh** 1972 (3) SA 430 (A).

& Others⁸² and **S v Kubeka**.⁸³

31.4.1.3 In **S v Sauls**⁸⁴ it was held that the trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told. Further “that the exercise of caution must not be allowed to displace the exercise of common sense”.⁸⁵

31.4.1.4 More recently though, In **Director of Public Prosecutions v S**,⁸⁶ Mrs Meintjies for the appellant argued that the court *a quo* over-emphasised the (cautionary) rules and, in doing so, misdirected itself. In referring to **S v J**⁸⁷ she argued that there is no obligation upon a court to apply the cautionary rules of practice. Kirk-Cohen J found that “the proper judicial approach is not to insist on the application of the cautionary rules but to consider each case on its own merits.” He continues by stating that -⁸⁸

(i) it is so that children lack the attributes of adults and, generally speaking, the younger, the more so. However, it cannot be said that this consideration *ipso facto* requires of a court that it apply the cautionary rules of practice as though they are matters of rote. On a parity of reasoning it cannot be said that the evidence of children, in sexual and other cases, where they are single witnesses, obliges the court to apply the cautionary rules before a conviction can take place.

31.4.2 Submissions

31.4.2.1 A joint submission from **Rape Crisis (Cape Town), Women and Human Rights Project (Community Law Centre, UWC) and ANC Parliamentary Women’s Caucus** argues against the retention of the cautionary rule in sexual offence cases by relying on the retention of the cautionary rule relating to single witnesses. **Neil van Dokkum** agrees and contends that

⁸² 1981 (3) SA 172 (A).

⁸³ 1982 (1) SA 534 (W).

⁸⁴ 1981(3) SA 172(A) at 180.

⁸⁵ At 173.

⁸⁶ 2000 (2) SA 711 (T).

⁸⁷ As discussed above in relation to the cautionary rules relating to children.

⁸⁸ At 715.

the interests of the accused will be secured by retaining the cautionary rule regarding single witnesses and identification evidence.

31.4.2.2 A **Combined report by members of the SAPS Child Protection Units Kwazulu Natal** states that no problems are experienced with this rule. The report indicates the disparity in application of this rule by requesting that this rule should also be made mandatory for male witnesses.

31.4.2.3 **Adv R Songca**, of the University of the North, opines that corroboration, in the case of single witnesses, should only be required if there are major inconsistencies in a child's evidence, but it should not be regarded as a matter of course. He states that the rule should not be completely done away with. Instead the courts should have a discretion whether or not to apply it. To do so a case by case approach should be applied. In the same vein the **Association for Persons with Physical Disabilities** argue that it should only be one of the factors a judge or presiding officer should consider in weighing up all the evidence. Similarly **Tshwaranang** argue that the focus of the judge should be in assessing the reliability and credibility of the witness. Further that if it is possible for an accused to be convicted on the credible testimony of a single witness in other cases, then it should be possible in rape cases too.

31.4.2.4 Contrary to the above views **Mr K Worrall-Clare** opines that the cautionary rules as they pertain to the child witness, the single witness and the sexual complaint should be abolished as bringing the judiciary into disrepute. He states that there exists no empirical evidence to support the belief that these categories of persons are less reliable than ordinary witnesses. If anything the evidence on hand suggests that they might be more reliable and less prone to untruths.

31.4.3 Evaluation and recommendation

31.4.3.1 As is stated above section 208 of the **Criminal Procedure Act, 51 of 1977**, provides that an accused may be convicted of any offence on the single evidence of any competent witness. The law is clear on this point, yet the testimony of single witnesses (especially in sexual offence matters) has mostly been treated with the utmost caution. Based on the progressive dilution of the application of the cautionary rules as a whole by our courts, as demonstrated by the above judgements, it is recommended that the cautionary rule relating

to single witnesses in sexual offence cases should be abolished unequivocally. The court should have the opportunity of weighing the evidence of the single witness, without first cautioning itself of the fact that the witness is a single witness, and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told.

31.4.3.2 The Commission therefore recommends that the Sexual Offence Act should clearly state that this rule should no longer be applied. A clause encompassing the above three recommendations should read as follows:

xx Notwithstanding the provisions of the common law, any other law or any rule of practice, a court may not treat the evidence of a witness in criminal proceedings involving the alleged commission of a sexual offence pending before the court with caution merely because that witness is -

- (a) the complainant in such proceedings;**
- (b) less than 18 years of age; or**
- (c) the only witness to the offence in question.**

CHAPTER 32

EVIDENCE OF THE PREVIOUS SEXUAL HISTORY OF THE COMPLAINANT

32.1 Introduction and current position

32.1.1 In criminal trials, evidence relating to the character of a witness is only regarded relevant insofar as it pertains to the credibility of such a witness. Evidence aimed solely at establishing that a witness is of a bad or good character is therefore prohibited.¹

32.1.2 There are exceptions to this blanket rule:

- Where a witness leads evidence of his or her good character, evidence which refutes this evidence will be admissible;
- Section 227 of the **Criminal Procedure Act** also creates an exception to the general rule in respect of cases of rape and indecent assault. In terms of this section, the admissibility of the complainant's evidence of previous sexual history depends on a preceding finding of relevance by the court.

32.1.3 As the first exception is self explanatory, we will focus on section 227 of the **Criminal Procedure Act**. Section 227 provides that:

[1] Evidence as to the character of an accused or as to the character of any female against or in connection with whom any offence of an indecent nature is alleged to have been committed, shall, subject to the provisions of subsection (2), be admissible or inadmissible if such evidence would have been admissible or inadmissible on the thirtieth day of May, 1961.

[2] Evidence as to sexual intercourse by, or any sexual experience of, any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.

¹ Schwikkard et al **Principles of Evidence** Cape Town: Juta 1997 at 60 as quoted by Rape Crisis (Cape Town) et al in the Discussion Document 'Legal Aspects of Rape in South Africa' 1999 at 91.

[3] Before an application for leave contemplated in subsection (2) is heard, the court shall direct that any person whose presence is not necessary may not be present at the proceedings, and the court may direct that a female referred to in subsection (2) may not be present.

[4] The provisions of this section are *mutatis mutandis* applicable in respect of a male against or in connection with whom any offence of an indecent nature is alleged to have been committed.²

32.1.4 Prior to the introduction of section 227, the admissibility of evidence of previous sexual history was determined with reference to the common law position. This enabled the defence to question the complainant as to her previous sexual relations with the accused. Although the accused was prohibited from leading evidence of the complainant's sexual relations with other men, she could be cross-examined on this aspect since it was viewed as relevant to credibility. Evidence to contradict denials of previous sexual history by the complainant could only be led if such evidence was relevant to consent. These rules implied that in practice, evidence of previous sexual history was admitted relatively freely.³ The common law provisions were criticised on a number of grounds:⁴ cross-examination concerning previous sexual history traumatises and humiliates the complainant; the evidence it elicits is irrelevant and at most establishes a general propensity to have sexual intercourse; evidence of this nature is held to be inadmissible in other cases and there are no grounds for admitting it where the case is of a sexual nature; and the possibility of such cross-examination deters victims from reporting the offence.

32.1.5 The current formulation of section 227 followed a recommendation by the South African Law Commission⁵ that legislation should afford complainants the necessary protection against unwarranted disclosure of their previous sexual history.⁶ The Commission, however, pointed

² This section must be read together with sections 197 which provides that an accused may in certain circumstances be cross-examined as to his or her character or previous convictions, section 210 which allows for the reception of similar fact evidence if it reveals the accused's criminal disposition or bad character, provided such evidence is sufficiently relevant and section 211 which provides that subject to certain convictions evidence of the accused's previous convictions is inadmissible.

³ Schwikkard et al **Principles of Evidence** Cape Town: Juta 1997 60 - 61.

⁴ Ibid at 61.

⁵ Project 45 **Report on Women and Sexual Offences** 1985.

⁶ At par 3.24 - 3.31.

out that a distinction should be drawn between evidence concerning previous sexual experience with the accused on the one hand and with a person other than the accused on the other hand. The Commission found that in the case of the former, the questions will always be relevant and their limitation by the legislature may involve a very real danger of prejudicing the accused.⁷ In accordance with the recommendation of the Commission, section 227 was amended⁸ by adding three new subsections to the original provisions. The effect of this amendment is that evidence of previous sexual history will now only be allowed where leave of the court to lead such evidence is sought.⁹ The court will only grant leave to lead such evidence if relevance is established. The relevant subsection basically provides that evidence relating to the sexual experience of the complainant (outside of the act complained of) will be inadmissible, and cross-examination of the complainant on such matters impermissible, without the leave of the court. In terms of section 227(3) an application to lead such evidence must be made *in camera*. However, the complainant's prior sexual history with the accused remains relevant and no application needs to be made to lead this evidence.¹⁰ Section 227(4) makes these provisions applicable to complainants irrespective of gender.

32.1.6 The court's notion of what is relevant becomes the sole criterion in determining admissibility.¹¹ Du Toit *et al* opine that 'relevance', in this context, will probably be given the same meaning as that which it has in the context of section 210 of the **Criminal Procedure Act**, in which case the court should consider, not only whether the evidence is logically relevant but, further, whether it is legally or sufficiently relevant. Du Toit *et al* conclude that evidence of the complainant's sexual history will thus be inadmissible and cross-examination of the complainant will be impermissible if the court is of the view that the probative value of the evidence so elicited is substantially outweighed by its disadvantages or prejudicial qualities. Du Toit *et al* argue that several policy concerns which militate in favour of not admitting previous sexual history exist. These policy concerns include the need to protect the witnesses from hurtful, harassing and humiliating attacks, and the recognition of a person's right to privacy in the highly sensitive area of sexuality. On the other hand Schwikkard records that the primary

⁷ At par 3.24 - 3.25.

⁸ By section 2 of the Criminal Law and Criminal Procedure Amendment Act 39 of 1989.

⁹ Section 227(2).

¹⁰ Section 227(2).

¹¹ Du Toit et al, **Commentary on the Criminal Procedure Act** Cape: Juta 1993 at 24-100B.

purpose for which the amendments to section 227 (as it presently stands) were enacted is undermined by the very wide discretion conferred on judicial officers. She expands the objection by explaining that the same judicial officers who in the past failed to exercise their discretion to exclude irrelevant previous sexual history evidence are now being asked to exercise the very same discretion.¹²

32.2 Comparative analysis

32.2.1 Canada

32.2.1.1 In Canada sections 276 and 277 of the **Canadian Criminal Code** regulate the admissibility of the complainant's evidence of previous sexual history. Section 276 was preceded by provisions¹³ which considerably limited the admissibility of evidence of previous sexual history by stating that no evidence could be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless-

- it was evidence that rebutted evidence of the complainant's sexual activity or absence thereof which had previously been adduced by the prosecution;
- it was evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had had sexual contact with the complainant on the occasion set out in the charge; or
- it was evidence of sexual activity that had taken place on the same occasion as the sexual activity that formed the subject-matter of the charge, where that evidence related to the consent that the accused alleged he had believed the complainant to have given.

Section 277 of the **Canadian Criminal Code** provides as follows:

277. In proceedings in respect of an offence under . . .,¹⁴ evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or

¹² Schwikkard at 61.

¹³ R.S.C., 1985, c. C-46 (formerly sections 246.6 and 246.7 of the Criminal Code).

¹⁴ Reference to an extensive list of sexual offence related offences.

supporting the credibility of the complainant.

The exclusionary rule only becomes relevant where evidence of general or specific sexual reputation is tendered to challenge or support the complainant's credibility. There are no statutory exceptions. Evidence of sexual reputation tendered for other than a proscribed purpose is not excluded under the section, although it may engage the exclusionary rule of section 276.¹⁵

32.2.1.2 The constitutionality of sections 276 and 277 was challenged in **R v Seaboyer; R v Gayme**¹⁶ on the basis that these sections allowed for the exclusion of admissible evidence which may be relevant to the defence, thus permitting an infringement of the constitutionally protected rights to life, liberty and security¹⁷ and to a fair trial.¹⁸ The Supreme Court of Canada found that section 276 was inconsistent with sections 7 and 11(d) of the Charter, and that this inconsistency was not justified under section 1 of the Charter. Section 277 was found to be consistent with the Charter.

32.2.1.3 In response to the **Seaboyer** decision, the Canadian legislature enacted the current formulation of section 276 in terms of which evidence of the complainant's previous sexual activity is inadmissible to support an inference that by reason of the sexual nature of that activity, the complainant is more likely to have consented to sexual activity that forms the subject matter of the charge or is less worthy of belief. This applies even where the previous sexual activity took place between the complainant and the accused.

32.2.1.4 Section 276¹⁹ reads as follows:

276[1] In proceedings in respect of an offence²⁰ . . . evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity,

¹⁵ **Tremear's Criminal Code** at 530.

¹⁶ [1991] 2 R.C.S. 577.

¹⁷ Section 7 of the **Canadian Charter of Rights and Freedoms**.

¹⁸ Section 11(d) of the **Canadian Charter of Rights and Freedoms**.

¹⁹ As amended in order to realign this section with the Canadian Charter.

²⁰ Reference to extensive list of sexual offence related sections.

the complainant

- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
 - (b) is less worthy of belief.
- [2] In proceedings in respect of an offence referred to in subsection [1], no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
- (a) is of specific instances of sexual activity;
 - (b) is relevant to an issue at trial; and
 - (c) has significant probative value that is not substantially outweighed by the danger or prejudice to the proper administration of justice.
- [3] In determining whether evidence is admissible under subsection [2], the judge, provincial court judge or justice shall take into account
- (a) the interests of justice, including the right of the accused to make a full answer and defence;
 - (b) society's interest in encouraging the reporting of sexual assault offences;
 - (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
 - (d) the need to remove from the fact-finding process any discriminatory belief or bias;
 - (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
 - (f) the potential prejudice to the complainant's personal dignity and right of privacy;
 - (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
 - (h) any other factor that the judge, provincial court judge or justice considers relevant.

Section 276(1) further provides for the form and content of an application for a hearing to consider the admissibility of the evidence and the subsequent manner in which a hearing is to be held in terms of section 276. The exclusion of the jury and the public from the hearing as well as a prohibition against publication are expressly provided for. The presiding officer is obliged to determine the admissibility of the evidence and to provide reasons for his or her determination.

32.2.1.5 Significantly the preamble to the amendment Act details the legislature's concern with the incidence of sexual violence in the Canadian society (in particular, the prevalence of sexual assault against women and children). The preamble also recognises the unique

character of the offence of sexual assault and how sexual assault and more particularly, the fear of sexual assault, affects the lives of people in Canada. The legislature further sets out its wish to encourage the reporting of incidences of sexual violence, and to provide for the effective prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons. The new legislation was enacted in the belief that at trials of sexual offences, evidence of complainants' sexual history is rarely relevant and that its admission should be subjected to particular scrutiny, bearing in mind the inherently judicial nature of such proceedings.

32.2.1.6 The constitutionality of the new section 276 was recently unsuccessfully challenged in **R v Darrach**²¹ on the ground that section 276(1) was unconstitutional since it contained a 'blanket prohibition' against the admissibility of a complainant's sexual history. The appeal court (per Morden JA) applied the following principle as set out in the **Seaboyer** judgement:

evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct more likely to have consented to the sexual conduct at issue in the trial or less worth of belief as a witness.

32.2.2 New Zealand

32.2.2.1 Before the 1990 amendment, the New Zealand 'rape shield law' was embodied in section 23A of the **Evidence Act** 1908. Like the South African formulation, this section operates primarily to exclude evidence of the complainant's previous sexual history, excluding the sexual experience of the complainant with the accused, but has exceptions based on the relevance of the evidence. Evidence and questions relating directly or indirectly to sexual experience with any person other than the accused or her sexual reputation is prohibited except where the judge grants leave for the admission of such evidence or question.²² The judge may only grant such leave if he or she is satisfied that the evidence to be adduced or question to be put to the complainant is of such direct relevance to the facts in issue or the issue of appropriate sentence that to exclude it would be contrary to the interests of justice - provided

²¹ Judgement by Ontario Court of Appeals dated 4 February 1998, Judgement No C19455.

²² Section 23A(2).

that the evidence or question shall not be regarded as being of such direct or indirect relevance by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.²³ The section therefore excludes evidence of promiscuity and prostitution, although it does not control the admissibility of evidence of sexual experience of the complainant with the accused.²⁴

32.2.2.2 In interpreting section 23A(2) and (3), courts have sought to strike a balance between protecting the complainant from undue harassment and unduly hampering the defense.²⁵ The significance of the focus on ‘relevance of the evidence’ was underlined by the court in the case of **R v McClintock** where the court held that a question or evidence may not be admissible merely because it is in some way relevant. It must have such direct relevance to the facts in issue that to exclude it would be contrary to justice.²⁶ This interpretation seems to indicate that questions or evidence of the complainant’s credibility (be it evidence of promiscuity or prostitution) would be allowed provided the question or evidence has direct relevance to the facts in issue.²⁷

32.2.2.3 New Zealand courts have despite the **McClintock** pronouncement, proceeded to grant leave to put questions to the complainant which do not meet the threshold set in that case, i.e. allowing questions or evidence questions which are not relevant to the facts in issue.²⁸

²³ Section 23A(3).

²⁴ New Zealand Law Commission **Evidence Law Character and Credibility - A discussion document** 1997 at 105.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ This happened in **R v Taria** (1993) 10 CRNZ 14 (HC). In this case in support of the accused defense of consent, the defense attorney wanted to cross-examine the complainant about “love bites” given to her a week before the alleged rape, which she had shown to other people. The defense argued that if the complainant denied that the accused had given her love bites, then leave ought to be granted under s23A for her to be cross-examined on this aspect. The Judge granted leave concluding that the cross-examination met the test of direct relevance to the facts in issue. It is difficult to see how the fact that another person (or the accused himself) gave the complainant love bites can be directly relevant to the question of her consent to the accused a week later.

This was due to inadequate weight being given to section 23A(3).²⁹

32.2.2.4 In an attempt to restrict questions or evidence which may be put or offered about the complainant in sexual offence cases, and to ensure that such questions are of direct relevance to the facts in issue, the New Zealand legislature enacted section 9 of **New Zealand Evidence Act** of 1908. Section 9 provides that:

- [1] In a sexual case, no evidence may be given and no question may be put to a witness relating directly or indirectly to the sexual experience of the complainant, except with leave of the court.
- [2] In a sexual case, no evidence may be given and no question may be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters
 - [a] for the purpose of supporting or challenging the general truthfulness of the complainant; or
 - [b] for the purpose of establishing the complainant's consent; or
 - [c] for any other purpose with the leave of the court.
- [3] In an application for leave under subsection [1] or [2]
 - [a] the court must not grant leave unless satisfied that the evidence or question is of such direct relevance to the facts in issue in the proceeding or the issue of appropriate sentence that it would be contrary to the interests of justice to exclude it; and
 - [b] if the application is made in the course of a hearing before a jury, it must be made and dealt with in the absence of the jury.
- [4] This section does not authorize evidence to be given or any question to be put that could not be given or put apart from this section.

32.2.3 United States

32.2.3.1 The United States, like Canada, seem to have gone further than other jurisdiction in offering protection to the complainant in sexual offence cases. Rule 412 of the Federal Rules of Evidence which applies in cases of rape or assault with intent to commit rape, prohibits reputation or opinion evidence of the past sexual behaviour of the complainant.³⁰ However, the rule allows evidence of the complainant's past sexual behaviour (other than reputation or

²⁹ New Zealand Law Commission **Evidence Law Character and Credibility - A Discussion Document** 1997 at 105.

³⁰ Althouse **Thelma and Louise and the Law: Do Rape Shield rules matter?** (1992) 25 Loyola of Los Angeles LR 757 at 765.

opinion evidence) under certain strict procedural conditions, and if it is constitutionally required to be admitted, or

- it is evidence of past sexual behaviour with persons other than the accused which goes to the issue of whether the defendant was the source of semen or injury, or
- evidence of past sexual behaviour with the accused, which goes to the issue of consent.

As is the case in other jurisdictions, the application of this rule has led to controversy. Problems encountered in applying the rule are that:

- judges interpret the exceptions generously in favour of accused persons; and that
- the defence resort to expansive definitions of constitutional rights to confront the witness or to present evidence in order to admit such evidence.³¹

32.2.4 Namibia

32.2.4.1 Namibia recently amended section 227 of the **Criminal Procedure Act**³² by enacting section 227A in terms of the **Criminal Law Amendment Act** of 1997. The amendment generally precludes the introduction of evidence of prior sexual conduct or reputation of the complainant except under limited circumstances which relates directly to providing or disproving the conduct which is the basis of the prosecution against the accused. The amended section provides as follows:

227A. [1] No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be adduced, and no question regarding such sexual conduct or experience shall be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave shall only be granted if the court is satisfied that such evidence or questioning -

³¹ Ibid.

³² Act 51 of 1977.

- [a] tends to rebut evidence that was previously adduced by the prosecution;
or
- [b] tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or
- [c] is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused.

Provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.

[2] No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, shall be admissible in such proceedings.

[3] Before an application for leave contemplated in subsection [1] is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, shall not be present at such application proceedings.

[4] The court's reasons for its decision to grant or refuse leave under subsection [1] to adduce such evidence or to put such question shall be recorded, and shall form part of the record of the proceedings.

32.2.5 Victoria

32.2.5.1 Under section 37A of the **Evidence Act** 1958, the court is to forbid any questions and exclude evidence of the general reputation of the complainant with respect to chastity; evidence and questions on the sexual history of the complainant with persons other than the accused is admissible only with the permission of the court; and the permission of the court is not to be granted unless it is satisfied that the evidence is substantially relevant to the issues in the case or is proper matter for cross-examination as to the complainant's credibility. Further, evidence is not to be regarded as substantially relevant if it does no more than suggest general disposition. Nor is it to be regarded as proper matter for cross-examination as to credit unless there are special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.³³

32.2.5.2 The Law Reform Commission of Victoria found that **The Crimes (Sexual Offences) Act** 1991 has increased the number of sexual offences that are subject to these

³³ Law Reform Commission of Victoria **Rape: Reform of Law and Procedure** Interim Report 1991 Report No.42 at 38.

rules. The Commission also recommended that the Act should provide that the court must state in writing, for the record, the reasons for granting an application under section 37A. However, the Commission also recommended that the rules set down in section 37A of the **Evidence Act** 1958 should also apply to cases where the victim is to be cross-examined, or evidence led, about her prior sexual experience with the accused.³⁴

32.2.6 Uganda

32.2.6.1 Under the current law,³⁵ evidence of prior sexual intercourse may be produced at the trial. Section 153(d) of the **Evidence Act** provides that the credit or trustworthiness of a witness may be impeached by either party where “a man is prosecuted for rape or an attempt to ravish, by evidence, that the prosecutrix was of generally immoral character.”³⁶ The Uganda Law Reform Commission found that by allowing the defence to adduce evidence of immoral character, the prosecution’s case is weakened and the impression is created that it was justifiable for the victim to be raped. The Commission have made the following recommendations³⁷ relating to the evidence of prior sexual intercourse:

- Victims of rape, defilement and other sexual offences should not be liable to cross-examination upon their prior sexual experience. Evidence of such prior sexual experience should not be admissible at the trial unless the fact of such sexual experience is relevant to the defence. This should be left to the discretion of the court to decide on its admissibility.
- The general reputation or moral character of the victim should not be deemed relevant to the defence. Section 153(d) of the **Evidence Act**, on the admissibility of evidence of the victim’s morality, should be repealed.
- Where the accused intends to cross-examine the victim or to call evidence

³⁴ This recommendation was confirmed in the Law Reform of Commission of Victoria Report No.43 **Rape: Reform of Law and Procedure** 1991.

³⁵ **Evidence Act**, No 43 of 1964.

³⁶ Uganda Law Reform Commission **A Study Report on Rape, Defilement and Other Sexual Offences** Publication No.1 2000 at 106.

³⁷ Ibid.

concerning her prior sexual experience, he or she should seek leave of the court.

32.2.6.2 The recommended amendment³⁸ of the **Evidence Act** reads as follows:

5. The Evidence Act is amended -

[b] in Section 136 -

[i] by inserting immediately after subsection [2] the following new subsection -

[2][a] A victim of an offence under Part XV of the Penal Code Act shall not be cross examined on his or her prior sexual experience except with leave of court.

32.3 Submissions received

32.3.1 The Issue Paper posed the question as to whether the application of section 227(2) of the Criminal Procedure Act, 1977 caused problems in practice.

32.3.2 Without elaborating some respondents³⁹ plainly state that no problems are experienced, while others hold an opposing view.⁴⁰

32.3.3 **Dr J A Van S d'Oliviera, the Attorney General Transvaal** opines that section 227 seems to provide adequately for the limitation of such evidence to instances of relevance. **A J Van Wyk** lauds the enactment of section 227(2) as enabling presiding officers with the means to protect innocent women. He states that in the majority of cases where an attempt was made to attack the witness (before and after the enactment of section 227(2)) on her sexual history, it turned out to be no more than "a fishing expedition with no hope of catching anything". However he also cautions that in order to protect a woman, the presiding officer must be *au fait* with what is and what is not relevant.

32.3.4 The caution voiced by **A J Van Wyk** regarding the application of section 227 is echoed

³⁸ Ibid at 207.

³⁹ **SAPS Serious Violent Crime Unit, Kwazulu Natal; Mpumalanga Provincial Government, Department of Local Government, Housing and Land Administration; J A Van S d'Oliviera, the Attorney General Transvaal.**

⁴⁰ **Association for Persons with Physical Disabilities, Northern Cape.**

in a joint submission by **Rape Crisis (Cape Town), Community Law Centre, University of the Western Cape** and the **ANC Parliamentary Women's Caucus** where the point is made that although evidence of prior sexual activity may be admitted only with the consent of the presiding officer, the eventual admissibility of such evidence is still left to the discretion of the presiding officer. This leaves the criteria to be used in deciding the relevance of evidence undetermined. In the same vein **Tshwaranang Legal Advocacy Centre** state that it should not be left to the discretion of untrained judges and magistrates to allow or disallow questions relating to previous sexual history. These are never relevant and should be disallowed. The respondent further contends that implementation of this section is problematic as hidden attitudes and prejudices result in discrimination to women. **Tshwaranang Legal Advocacy Centre** conclude that any questions relating to complainants' previous sexual history should be inadmissible. However, questions relating to offenders' previous sexual history should be allowed as these are relevant.

32.3.5 **Dr J M Loffell, Social Work Consultant, Johannesburg Child Welfare Society** states that in the Society's experience, the problem continues to be a lack of education of prosecutors and magistrates and a failure to regard a child as such. For example, if abuse has been ongoing, there is a lack of understanding as to why the child "agreed for the abuse to continue".

32.3.6 On a different note, **W L Clark, a Senior Public Prosecutor in Verulam** opines that section 227 is rarely an issue. In her opinion one should differentiate between different categories of children. On the one hand she says that a child of seven or eight (or younger), even if technically promiscuous, cannot be assessed the same way as a 16 or 17 year-old. A young child may well have been forced into prostitution by an unscrupulous older person, and she (or he) deserves to be fully protected by the law, whatever the circumstances. Evidence of character should be absolutely excluded. On the other hand, in the case of a much older child, she states that the child should still be offered protection by the law. However, if evidence of character may be of some relevance it could be a factor to be considered, not so much in assessing the guilt of the accused, but in assessing sentence. In her opinion to assault a chaste, innocent 16 year-old indecently is deserving of a more severe punishment than to perform a similar act with a promiscuous child of the same age. Both are criminal acts deserving punishment if the rights of children are to be properly protected, but the individual facts of each case must be looked at and all the circumstances, including character, are of relevance in assessing a proper sentence.

32.3.7 One respondent⁴¹ submits that section 227 is abused by the defence resulting in secondary trauma of the complainant. Another avers,⁴² that the application of section 227(2) of the Criminal Procedure Act poses a real problem in reality and should be done away with. The issue of “character” should be seen as irrelevant when dealing with sexual offences in general. Yet another⁴³ contended that present measures do not go far enough to provide protection against unwarranted cross-examination and that practical experience has shown that section 227 is seldom applied properly. They propose that a more specific test should be formulated to determine relevance.

32.4 Evaluation and recommendation

32.4.1 As is stated above the criterion for the admissibility of evidence is relevance. Traditionally, evidence on the previous sexual history of complainants in rape cases was believed to be relevant to consent and credibility of the complainant as a witness. This rule provides a stark exception to the general rule that the character of a witness is not relevant to credibility (or lack thereof), and implies that the complainant who has previously engaged in sexual activity is more likely to consent to sexual activity on any other occasion. It further implies that the complainant is also generally more inclined to be untruthful and thus unreliable as a witness.

32.4.2 The character of the complainant is normally at the centre of sexual offence cases. It is believed to reflect on the truthfulness of the complainant. Often the evidence relevant to truthfulness crosses the ill-defined borderline to evidence relevant to the issue, particularly when the issue is (as is often the case in sexual offence cases) consent. Because absence of consent is difficult to establish, there is frequently a contest of credibility between the complainant and the accused. The accused often seeks to show, on the basis of the complainant’s sexual behaviour on other occasions, that she is more likely to have consented. The complainant’s character often becomes the focus of the trial. Introducing evidence of sexual history may divert the attention of the fact finder from the behaviour of the accused at the time of the offence, to the behaviour of the complainant on earlier, unrelated occasions. As

⁴¹ **Hannie Reyneke, Vryheid Child and Family Welfare Society.**

⁴² **L M Kekana, Gauteng Provincial Government, Department of Public Safety and Security.**

⁴³ Joint submission by **Rape Crisis (Cape Town), Community Law Centre, University of the Western Cape** and the **ANC Parliamentary Women’s Caucus.**

a result, complainants in sexual cases often feel that they are on trial, not the defendant.

32.4.3 This is exacerbated by the considerable latitude granted to defence attorneys in cross-examination of complainants in sexual offence cases. For example, the defence is normally permitted to question the complainant about acts of intercourse with persons other than the accused and by so doing introduces evidence of promiscuity or prostitution.

32.4.4 Studies have shown that not only are women likely to be victims of sexual assault, but their credibility in sexual offence cases is also not judged on the same criteria as men.⁴⁴ Their credibility has traditionally received particular scrutiny due to the existence of certain myths. These myths include the belief that-

- women are likely to fabricate complaints of sexual assault;
- promiscuous women or female sex workers deliberately provoke sexual assault ("they ask for it") and are therefore less deserving of protection;
- women are prone to fantasise about rape to the extent of actually desiring it.⁴⁵

All these myths are easily discredited:

- There is no evidence that complaints of sexual offences are fabricated on a larger scale than complaints of other kinds of offences. In view of the further degradation and secondary victimisation that women endure after laying a charge of a sexual offence, they may have less reason than complainants in other offences to fabricate complaints.⁴⁶
- Promiscuous women and prostitutes are entitled, in the same way as promiscuous men, to choose their sexual partners and clients and do not lose -

⁴⁴ New Zealand Law Commission **Evidence Law Character and Credibility - A Discussion Document** 1997 and Althouse supra.

⁴⁵ Training materials for prosecutors: 'Making the Connections' (unpublished) Developed for Adapt by Fedler et al.

⁴⁶ Ibid.

by virtue of their promiscuity or the fact that they are prostitutes - their sexual protection.⁴⁷

- No empirical support has been found to support the myth relating to women fantasising about being raped. It is contended that this myth is based on nothing more substantial than the age-old stereotyping of women.

32.4.5 Despite the enactment of section 227 of the **Criminal Procedure Act** which is intended to restrict evidence or questions relating to a complainant's sexual history, adherence to these myths persist. The unfettered discretion given to presiding officers to determine the admissibility of such evidence on the broad and subjective basis of relevance seems to be a large part of the problem.

32.4.6 The Commission is of the opinion that evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) should not be admissible solely to support the inference that the complainant is by reason of such conduct more likely to have consented to the sexual conduct at issue in the trial or less worthy of belief as a witness. Evidence offered about the particular incident should inform the outcome of the proceedings, not evidence related to earlier events in the complainant's life.

32.4.7 The Commission proposes that section 227 of the **Criminal Procedure Act** be amended to clearly delineate the circumstances under which evidence of previous sexual history may be adduced. The Commission is of the opinion that the proposed provision will not impinge on the right of the accused to a fair trial as evidence of sexual history that is of direct relevance will still be admissible.

32.4.8 The following substantially amended provision is recommended:

227 Evidence of character and previous sexual history

[1] Evidence as to the character of an accused or as to the character of any **[female]** person against or in connection with whom any offence of an indecent nature is alleged to have been committed, shall, subject to the provisions of subsection [2], be admissible

⁴⁷ Ibid.

or inadmissible if such evidence would have been admissible or inadmissible on the thirtieth day of May, 1961.

- [2] (2) No evidence as to any previous sexual [intercourse by, or any sexual] experience or conduct of any [female] person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall [not] be adduced, and [such female shall not be questioned] no question regarding such sexual [intercourse or sexual] experience or conduct, [except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried] shall be put to such person or any other witness at the proceedings pending before the court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question. ;
- [3] Before an application for leave contemplated in subsection [2] is heard, the court [shall] may direct that any person, including the complainant, whose presence is not necessary may not be present at the proceedings[, and the court may direct that a female referred to in subsection [2] may not be present].
- [3A] The court shall, subject to subsection [3B] grant the application referred to in subsection [2] if satisfied that such evidence or questioning -
- (a) relates to a specific instance of sexual activity relevant to a fact in issue;
 - (b) is likely to rebut evidence previously adduced by the prosecution;
 - (c) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or
 - (d) is not substantially outweighed by its potential prejudice to the complainants's personal dignity and right to privacy; or
 - (e) is fundamental to the accused's defence.
- [3B] The court shall not grant an application referred to in subsection [2] if, in its opinion, such evidence or questioning -

- (a) relates to the sexual reputation of the complainant and is intended to challenge or support the credibility of the complainant;
- (b) is sought to be adduced to support an inference that by reason of the sexual nature of the complainant's experience or conduct, the complainant-
 - (i) is more likely to have consented to the offence being tried; or
 - (ii) is less worthy of belief.

Subsection (4) of the previous section 227 is to be deleted.

CHAPTER 33**EXPERT EVIDENCE IN SEXUAL OFFENCE CASES****33.1 Introduction**

33.1.1 Opinion evidence is generally inadmissible in South African courts as such evidence lacks probative value - it cannot assist the court in determining the *facta probanda* of a case. There are, however, generally two situations where opinion evidence is admissible on account of its relevance. Expert opinion evidence is admissible to prove matters or issues of specialised knowledge and the opinion of a lay witness may be received on matters within the competence and experience of people generally.

33.1.2 Opinion evidence may be admissible if it can assist the court in determining the ultimate issue or if it is of material assistance to the court. Thus, if the issue is of such a nature that a witness is in a better position than the court to form an opinion, the opinion will be admissible on the basis of its relevance.¹ Any opinion, however, whether expert or non-expert, which is expressed on an issue on which the court can decide without receiving such opinion, is in principle inadmissible because it is deemed superfluous and thus irrelevant.²

33.1.3 Although expert evidence spans a broad range of areas of speciality, such as handwriting, fingerprints, ballistics and the like, this chapter will selectively address the following areas related to expert testimony:

- (a) the persons who may be deemed to be expert witnesses;
- (b) the admissibility of expert evidence regarding the phenomena of Sexual Assault Trauma Syndrome and Child Sexual Abuse Accommodation Syndrome;³
- (c) the need to extend expert evidence to all forms of trauma associated by the commission of a sexual offence.

¹ Schwikkard et al **Principles of Evidence** Cape Town: Juta 1997 at 60 as quoted by Rape Crisis (Cape Town) et al in the Discussion Document 'Legal Aspects of Rape in South Africa' 1999 at 80.

² Ibid.

³ Both syndromes group specific characteristics which have been identified as responses unique to persons experiencing sexual abuse.

33.2 The expert witness

33.2.1 A witness, who is by reason of his or her special knowledge and skill, better qualified than the court to draw proper inferences and who can furnish the court with information falling outside the knowledge and experience of any reasonable court, is considered an expert. A party to the proceedings who wishes to call an expert should satisfy the court that the witness is indeed an expert in his or her field and an expert for the purpose for which she or he is called.⁴ Besides his or her specialist knowledge, skill or training, an expert witness differs from a lay witness, who is usually an observational witness, in that the expert's entire knowledge of the case might have been obtained after he or she has been enlisted as a witness.⁵

33.2.2 In **Mohamed v Shaik**⁶ it was said that it is the function of the court to decide whether an expert has the necessary qualifications and experience to enable him or her to express reliable opinions. Formal qualifications are not always essential and in many instances the practical experience of the witness might be decisive.⁷ The fundamental test is still whether the evidence can assist the court and the result is that in certain circumstances formal qualifications without practical experience, may not be enough to qualify the witness as an expert.⁸

33.2.3 It is accepted that the true function of an expert witness is to guide the court to a correct decision on questions falling within the former's specialised field, but that the court must still decide the issues in dispute.⁹ The opinion of the expert, therefore, should not displace the decision which the court is required to make.

33.3 Admissibility of expert testimony

⁴ **S v Nangutuala** 1974 2 SA 165 (SWA) 167 C - E.

⁵ S Gross 'Expert testimony' 1991 **Wisconsin LR** 1125 as quoted in L Meintjes-Van Der Walt 'Science Friction: The Nature of Expert Evidence in General and Scientific Evidence in Particular' 2000 Vol 117 **The South African Law Journal** 771 at 774.

⁶ 1978 4 SA 523 (N).

⁷ Schwikkard at 88.

⁸ Schwikkard at 88.

⁹ See **S v Gouws** 1967 4 SA 527 (C) at 528.

33.3.1 Sections 212 and 232 of the **Criminal Procedure Act** regulate the admission of certain expert evidence by way of affidavit, certificate or oral evidence. The evidence referred to in these sections is largely medical or forensic scientific evidence, for example, the drawing and sealing of blood and photographic evidence. The concept of who an expert witness is, is flexible in that it is dependent on the presiding officer. It can therefore confidently be said that the fact that certain fields of speciality or expertise are not statutorily enumerated or addressed, does not exclude their possible admission by the presiding officer. The Magistrates' Courts Rules of Court and the High Court Uniform Rules of Court both address expert testimony, but only in relation to civil matters and insofar as the Rules prescribe that no person is entitled to call an expert witness save with leave of the court or the consent of all parties to the suit. The party also has to deliver notice of intention to call such witness and deliver a summary of such opinion within a prescribed time.¹⁰

33.3.2 A general framework for the admissibility of expert testimony in criminal cases is set out by Hoffmann and Zeffert:¹¹

- The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it.
- The expert's qualifications have to be measured against the evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give relevant evidence.
- It is not always necessary that the witness's skill or knowledge be acquired in the course of his or her profession. It is dependent on the topic.
- An expert witness may be asked to state his or her opinion either as an inference from facts within his or her personal knowledge, or upon the basis of facts proved by others (the testimony's probative value is increased if reasons are given for the opinion).
- The weight of the expert's opinion really depends on his or her reasons for that opinion

¹⁰ Rule 24(9) of the Magistrates Courts Rules of Court and Rule 36 of the High Court Rules of Court, Uniform Rules of Court.

¹¹ Hoffmann & Zeffert **The South African Law of Evidence** fourth edition Johannesburg: Butterworths 1989 at 100 -101.

and why it gives relevant assistance to the court. Expert witnesses are, in principle, required to support their opinions with valid reasons. They should be able to explain why they hold a particular belief or draw a particular inference. If proper reasons are advanced in support of an opinion, the probative value of such opinion will of necessity be strengthened. Expert evidence should also be linked with the other facts of the case and will of necessity lose all evidential value if its factual basis is found not to have been proved.

33.3.3 The principles applied by Satchwell J in the recent case of **Holtzhausen v Roodt**¹² to the admissibility of expert evidence were similar to the general 'framework of admissibility' set out by Hoffmann and Zeffert.

33.3.4 The value of expert evidence was specifically examined in this case. The Witwatersrand Local Division of the High Court *inter alia* had to assess the admissibility of expert evidence relating to Rape Trauma Syndrome,¹³ in the face of an objection that the relevance of such evidence was questionable. The explanation by the expert of why the complainant may not have reported the rape immediately, contributed to the establishment of the credibility of the complainant's¹⁴ testimony about the rape.¹⁵ Instead of casting further doubt on the accuracy of the complainant's testimony about the course of events during and after the rape, the explanation of possible 'inconsistent' statements and behaviour by an expert witness actually reinforced the complainant's credibility.

33.3.5 Satchwell J found that the witness testifying in this case in relation to Rape Trauma Syndrome did indeed qualify as an expert, for the following reasons:

- Her evidence was 'of assistance to the court' and 'helpful', and these are the criteria the court should use in its assessment as to whether or not the evidence is relevant.

¹² 1997 (4) SA 766.

¹³ Described as the grouping of symptoms or characteristic reactions or emotions displayed by victims of rape.

¹⁴ The victim of the rape was sued civilly (hence cited as the defendant) in an action for defamation arising out of the alleged publication by the defendant that she had been raped by the plaintiff.

¹⁵ At 771.

- Though it was argued by the defence that the expert's testimony would not assist the court in coming to the conclusion as to whether or not there had been a rape, the court nevertheless held that general evidence was indeed frequently used by the court and thus the evidence was admissible. The court, itself, she stated, engaged in its own process of inferential reasoning and thus the expert's testimony was admissible. This finding was made despite the fact that the expert did not have any knowledge of the defendant.
- In relation to the special knowledge and skill of the expert witness, Satchwell J stated that the rape of a woman is unlikely to be a topic or experience within the personal knowledge or experience of many judicial officers or any at all. She further stated that:¹⁶

[T]he ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited. In such circumstances I am of the view that it would be unwise and it would be irresponsible for myself as a judicial officer, who is lacking in special knowledge and skill, to attempt to draw inferences from facts which have been established by evidence, without welcoming the opportunity to learn and to receive guidance from an expert who is better qualified than myself to draw the inferences which I am required myself to draw.

- With regard to who should decide on the qualifications of an expert witness, Satchwell J held that it is for a judge to determine whether the witness has undergone a special course of study or has such experience or skill as will render him or her an expert in a particular subject. She also stated that it is certainly not necessary for the expertise to have been acquired 'professionally'.
- Finally, the value attached to the evidence would be assessed in light of all the evidence presented: the court would determine the probative value of the evidence and the extent to which it assisted the court in understanding the evidence presented before it.

33.3.6 The admissibility of evidence on Sexual Assault Trauma Syndrome

33.3.6.1 The presentation of expert evidence on the psychological effects of sexual offences for the purposes of sentencing is not unprecedented in South Africa. Expert evidence on Rape Trauma Syndrome, as a recognised phenomenon, was received for the first time in

¹⁶ At 561F-G.

S v Daniels and Three Others.¹⁷ This case involved a young working class woman who, after leaving a nightclub, was abducted and robbed by four young working class men who then took her to a deserted beach where they raped her repeatedly. The complainant was assessed by a clinical psychologist who prepared a comprehensive report on the impact of this rape on the complainant and gave evidence on Rape Trauma Syndrome in court. The court considered this evidence favourably:

The state led evidence that highlighted the horror of this trauma in a very insightful manner. I accepted [the clinical psychologist's] testimony. She submitted a detailed report, and this as well as her testimony helped the court to understand in greater depth, the consequences of this cruel assault. Her description of what is appropriately termed 'Rape Trauma Syndrome', made sense and helped me to understand the variety of psychological problems as manifestations of a recognized pattern.

33.3.6.2 This evidence assisted the court in arriving at an understanding of the often disparate symptoms of victims of sexual offences as well as advancing expert testimony on Rape Trauma Syndrome in sentencing.

33.3.7 The admissibility of evidence on Child Sexual Abuse Accommodation Syndrome¹⁸

33.3.7.1 Within the adversarial system used in South Africa, it often happens that defence counsel attack the credibility of state witnesses. This applies equally to adults and children. One common theme that the defence selects to discredit a child who has been a victim of sexual abuse is to ask why the child did not report the matter sooner, since it is often claimed that the abuse has been going on for years.¹⁹ The child may reply that he or she was afraid to tell anyone. It may then be difficult for a court to understand why such a horrific occurrence was not reported earlier. However, according to Professors Fouche and Hammond,²⁰ if an expert witness is called and describes the symptoms of the 'Child Sexual Abuse Accommodation Syndrome' which include recognised symptoms of secrecy, and delayed,

¹⁷ **S v Daniels** (Unreported) Cape Provincial Division, Case Number SS 162/92.

¹⁸ Described as the grouping of symptoms or characteristic reactions or emotions displayed by child victims of sexual abuse.

¹⁹ Professors Fouche and Hammond **The Child Witness** University of Natal April 1987 at p 29.

²⁰ Ibid.

unconvincing disclosure, the credibility of the child's case will be increased.²¹

33.3.7.2 Such evidence has been used internationally with the recognition that expert testimony on whether a child has been sexually abused is similar to 'battered child syndrome' and that the same kind of testimony should be available to assist a trier of fact who is attempting to determine whether sexual abuse has occurred.²²

33.3.7.3 Recently, in the matter of **S v M**²³ the Supreme Court of Appeal, per Melunsky AJA, admitted the evidence of two experts that the complainant had displayed symptoms consistent with child sexual abuse. The expert witnesses were a qualified and experienced social worker and a person holding a master's degree in clinical psychology. Both had extensive practical experience with abused children. The complainant presented with a variety of complaints, tension headaches, poor sleeping, poor appetite, poor concentration at school, nightmares and had kept the abuse a secret for three years. The experts testified that these complaints were all indicative of child sexual abuse. On the strength of this evidence the court accepted that the complainant was a traumatised young person. However Melunsky, AJA opined²⁴ that the trial magistrate should have approached the evidence of the social worker and the psychologist with more care and circumspection than he did, in that although the complainant's symptoms were consistent with her allegations of sexual abuse, other possible reasons for those symptoms were not excluded by the evidence and this fact should have been recognised and taken into account.

33.4 Comparative analysis

33.4.1 New Zealand

33.4.1.1 In New Zealand the first condition for the admissibility of expert opinion evidence

²¹ Ibid.

²² Ibid.

²³ 1999(2) SACR 548(SCA).

²⁴ At 555.

is that the expert must be properly qualified to give evidence on the issue.²⁵ At common law, experts are qualified by having specialised knowledge or skill gained from study, training or experience. The qualification requirement is based on an evaluation of the reliability of the evidence. The New Zealand Law Commission found that this requirement has operated well and was not in need of change.²⁶ However, at common law further conditions for the admissibility of expert opinion evidence are imposed by the ultimate issue rule and the common knowledge rule. Both these rules exclude opinion evidence by reference to particular issues in the case. The Law Commission found that neither rule directly addresses the reliability and value of the expert testimony which ought to be admitted. Therefore the Law Commission recommended that both these issue-based tests be abolished and replaced with an evidence-based test which requires specific consideration of the value and reliability of the expert opinion evidence.

33.4.1.2 In this regard The Law Commission proposed two options:

- The Australian approach which, as an exception to the opinion rule, allows the admission of properly qualified expert opinion evidence, subject to the general exclusionary power as a quality control;
- the United States Federal Rules approach which, as an exception to the opinion rule, allows the admission of properly qualified expert opinion evidence which would help the court or jury to determine the facts in a proceeding (the helpfulness rule), with the general exclusionary power operating in residual cases.

33.4.1.3 The Law Commission opined that if the helpfulness rule is adopted, it would rarely be necessary to invoke the general exclusionary power. Further that the two rules overlap and it could be argued that the helpfulness rule is unnecessary. However, the Law Commission opted provisionally for the inclusion of the helpfulness rule as an additional safeguard applying to expert opinion evidence. It found that the helpfulness rule appeared to have provided a clear and workable basis for excluding unsatisfactory opinion evidence in the United States .

²⁵ New Zealand Law Commission **Evidence Law: Expert evidence and opinion evidence** Preliminary Paper No 18 1991 Wellington.

²⁶ Ibid at viii.

33.4.1.4 The Law Commission concluded that whichever approach was to be adopted, decisions concerning the admissibility of expert opinion evidence would be able to be based upon an assessment of all the relevant aspects of the evidence. Expert opinion would still be evaluated for its reliability, its objectivity, the amount of information it provides for the jury or judge, and any other relevant factors.

33.4.1.5 The Law Commission also found that the best use of expert evidence would not be achieved without procedural reform in addition to reform of the evidential rules. The Commission proposed the following procedural reforms:

- The circumstances in which the court has the power to appoint an expert should be expanded. Although court experts should not be the primary source of expert testimony, the court should be able to appoint experts where it considers that it would be of value. In a criminal case, however, the court should not appoint an expert over the objections of the accused.
- It should be mandatory for parties in all cases, civil and criminal, to disclose in advance of trial the substance of any expert evidence they propose to offer. Prior notification achieves two major aims. It allows all parties to a proceeding time to investigate and evaluate the expert evidence, and if necessary find their own expert witness. It also allows refinement of the issues arising out of the expert evidence, thus saving the time.
- Subject to the direction of the court, experts should be able to present oral or written reports to the court rather than answer questions. Additionally experts should, in giving their evidence, be able to use aids to communication like diagrams, charts and video and computer presentations.

33.4.1.6 Specifically in relation to psychological and psychiatric evidence the New Zealand Law Commission found that the courts have correctly identified problems with this kind of evidence, treating it with justifiable suspicion in cases where it is highly subjective or would tend to conflict with the common sense reasoning of jurors. However, the Commission also found that there may be cases where evidence is at present inadmissible, but might assist the court. The Commission noted that in the case of child sexual abuse, the legislature has intervened to correct the inadequacy of the common law rules dealing with expert evidence by

way of the **Evidence Amendment Act 1989**.²⁷ However, this legislation is confined solely to sexual abuse and does not deal with the wider problems of psychological, psychiatric and other expert evidence. The Commission opined that this legislation was limited in three principal respects: it covers only the evidence of complainants under 17 years; it applies only to evidence from registered psychologists and psychiatrists; and it applies only to cases of a sexual nature. The Commission found that it was not desirable for rules of evidence to single out psychological and psychiatric evidence. Also, that the principles which should apply to such evidence are the same as should apply to all expert evidence. Finally as with all expert evidence, reliable and objective psychological and psychiatric evidence which assists the judge or jury should be admitted, while unhelpful evidence should be excluded.

33.4.1.7 In its report on Evidence, Reform of the Law²⁸ the New Zealand Law Commission propose the enactment of an Evidence code which is a comprehensive scheme that addresses all aspects of evidence law in one concise draft statute. The Evidence Code is intended to replace most of the existing common law and statutory provisions on the admissibility and use of evidence in court proceedings.

33.4.1.8 While retaining most of the recommendations contained in the Preliminary Paper, as discussed above, the recommendation on court appointed experts has been withdrawn so as to prevent a “judicial descent into the arena”.²⁹ The Evidence Code provisions relating to opinion evidence and expert evidence read as follows:

- 21 **Opinion Rule**
Opinion evidence³⁰ is not admissible in a proceeding³¹ except as provided by sections 22 and 24.
- 22 **Admissibility of non-expert opinion evidence**
A witness³² may offer opinion evidence in a proceeding if the opinion evidence

²⁷ Ibid at 21.

²⁸ Law Commission **Evidence Reform of the Law** Report 55 Volume 1 1999 Wellington New Zealand.

²⁹ Ibid at 27.

³⁰ Defined as an opinion offered in evidence tending to prove or disprove any fact.

³¹ Defined as a proceeding conducted by a court.

³² Defined as a person whom gives evidence and is able to be cross-examined in a proceeding.

is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

23 Admissibility of expert opinion evidence

- (1) Subject to section 25, a witness may offer expert evidence³³ that is opinion evidence³⁴ in a proceeding if that opinion evidence is likely to substantially help the fact-finder to understand other evidence in the proceeding or to ascertain any fact that is of consequence to the determination of the proceeding.
- (2) Expert evidence that is opinion evidence is not admissible by reason only that it is about
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.
- (3) Subject to subsection (4), to the extent that expert evidence that is opinion evidence is based on fact, the opinion evidence may be relied on by the fact-finder only to the extent that the facts on which it is based, other than facts pertaining to the general body of knowledge or skill comprising the witness's expertise, are or will be established in that proceeding by admissible evidence or will be judicially noticed.
- (4) If expert evidence that is opinion evidence is offered in relation to the sanity of a person, evidence of any statement³⁵ about that person's state of mind made to the expert³⁶ by that person is admissible to establish the facts on which the expert's opinion is based and neither the hearsay rule nor the previous consistent statements rule applies to evidence of any such statement.

24 Expert witnesses in cases involving certain complainants in sexual cases

- (1) This section applies to every sexual case in which the complainant, at the time of the alleged offence, was a child.
- (2) Subject to section 25, in a case to which this section applies, an expert witness may offer evidence on whether the complainant's behaviour as described in evidence given in the proceeding by a person other than the expert witness, was, from the expert witness's professional experience or knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

³³ Defined as the evidence of an expert based on the specialised knowledge or skill of the expert and includes evidence given in the form of an opinion.

³⁴ Defined as an opinion offered in evidence tending to prove or disprove any fact.

³⁵ Defined as (a) a spoken or written assertion by a person of any matter; or (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter.

³⁶ Defined as a person who has specialised knowledge or skill based on training, study, or experience.

- (3) An expert witness offering evidence under subsection (2) must give reasons for his or her opinion, including such evidence as is necessary for the expert witness to give a fair and balanced explanation of the research and experience on which that opinion is based.

25 **Admissibility, notice and disclosure of expert evidence**

- (1) Expert evidence, whether or not opinion evidence, is not admissible in a criminal proceeding unless
- (a) the party who proposes to offer the expert evidence gives notice in writing of that proposal to every other party to the proceeding except any party who has waived the requirement to give notice; or
 - (b) under subsection (3), the judge dispenses with the requirement to give the notice referred to in paragraph (a).
- (2) A notice under subsection (1) must
- (a) include the name, address and qualifications of the proposed witness and the contents of the proposed evidence; and
 - (b) be given
 - (i) a sufficient time before the hearing to provide all the other parties to the proceeding with a fair opportunity to prepare to meet the evidence; or
 - (ii) within such time, whether before or after the commencement of the hearing, as the judge may allow and subject to any conditions that the judge may impose.
- (3) The judge may dispense with the requirement to give notice under subsection (1)
- (a) if no party is substantially prejudiced by the failure to give notice; or
 - (b) if giving notice is not reasonably practicable in the circumstances; or
 - (c) if at the time notice should have been given in compliance with subsection (2)(b)(i), the necessity to offer expert evidence was not reasonably foreseeable by the party concerned; or
 - (d) in the interests of justice.

33.4.2 Australia

33.4.2.1 According to the Australian Law Reform Commission,³⁷ the courts have developed rules to exclude expert opinion evidence. These rules are:

- Common knowledge: If a matter is a matter within common knowledge - within ordinary human experience - then expert opinion evidence about it will not be

³⁷

The Law Reform Commission Interim Report No. 26 **Evidence Volume 2** 1985 Canberra at 173.

admitted.

- Field of expertise: Some support is to be found in the cases for a rule excluding expert opinion evidence where the evidence relates to matters not within a recognised field of expertise.
- Ultimate issue: It is commonly stated that a witness may not express his or her opinion upon an issue which the court or jury must determine.

However, the Australian Law Reform Commission has found that there are conflicting authorities and varying degrees of uncertainty as to the existence, scope and content of such rules. Legislative reform was deemed necessary and the proposed sections are quoted below:

Opinion evidence

66.(1) Evidence of an opinion is not admissible to prove the existence of a fact as to the existence of which the opinion was expressed.

(2) Where evidence of an opinion is relevant otherwise than as mentioned in sub-section (1), that sub-section does not prevent use of the evidence to prove the existence of a fact as to the existence of which the opinion was expressed.

Lay opinions

67. Where -

1. an opinion expressed by a person is based on what the person saw, heard or otherwise noticed about a matter or event; and
 2. evidence of the opinion is necessary to obtain an adequate account of the person's perception of the matter or event,
- sub-section 66(1) does not apply in relation to the evidence.

Opinions based on special knowledge

68. Where a person has special knowledge, skill, experience or training, sub-section 66(1) does not apply in relation to evidence of the opinion of that person based wholly or partly on that knowledge, skill, experience or training.

Ultimate issue rule abolished

69. Evidence of an opinion is not inadmissible by reason only that it is about a fact in issue.

33.4.3 Namibia

33.4.3.1 The Namibian legislature has opted to include sexual offence specific provisions

relating to expert evidence in the **Combating of Rape Act**,³⁸ as opposed to the all inclusive³⁹ approach followed by New Zealand and Australia. These provisions read as follows:

Evidence of period of delay between commission of sexual or indecent act and laying of complaint

7. In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of a complaint.

Evidence of psychological effects of rape

8. (1) Evidence of the psychological effects of rape shall be admissible in criminal proceedings at which an accused is charged with rape (whether under the common law or under this Act) in order -

- (a) to show that the sexual act to which the charge relates is likely -
 - (i) to have been committed towards or in connection with the complainant concerned;
 - (ii) to have been committed under coercive circumstances;
- (b) to prove, for the purpose of imposing an appropriate sentence, the extent of the mental harm suffered by that complainant.

(2) In estimating the weight to be attached to evidence admitted in terms of subsection (1), the court shall have due regard to -

- (a) the qualifications and experience of the person who has given such evidence; and
- (b) all the other evidence given at the trial.

In the Report on the law pertaining to rape,⁴⁰ the Namibian Law Reform and Development Commission concisely explains the rationale behind these two provisions as follows:

Clause 8 (Section 7 of the Act)

The purpose of clause 8 is to affirm the fact that the trauma of the complainant might cause her to delay the laying of a complaint, while she might not be able to give a satisfactory explanation for the delay. It is however important to take into account that provisions such as this one should be worded carefully in order not to deny the accused a fair trial. The effect of the provision is therefore that the court may draw an inference from a late complaint if it, together with the other evidence, suggest that the complainant has fabricated the charge. What the clause however provides is that a court should not assume that a late complaint per se would be an indication that the charge is a fabrication.

³⁸ Act No. 8 of 2000.

³⁹ These provisions provide for the leading of expert evidence in all matters, although New Zealand additionally provides for evidence specifically relating to children sexual abuse matters.

⁴⁰ 1997 at 6.

Clause 9 (Section 9 of the Act)

Clause 9 provides for the admissibility of that evidence that the complainant is suffering from rape trauma syndrome as evidence that the accused committed a sexual act against the complainant under coercive circumstances. Similar provisions are found in rape and sexual assault statutes of other jurisdictions.

33.4.4 United Kingdom

33.4.1 Sexual abuse cases are very prevalent in Britain.⁴¹ When the first substantial wave of such cases came before the higher courts, in the mid to late 1980's, there was undoubtedly a divergence of judicial view as to the appropriate response of the courts to the conduct of professionals in the child abuse field.⁴² However, it is interesting to note that there has been, for some time since, a movement from a conservative approach towards recognition of expert testimony by the English courts. In **R v Hove Juvenile Court, exp. W1**⁴³ it has been held that a social worker, police officer or other participant or observer (psychologist or psychiatrist) may give oral evidence as to what occurred, if this is the best evidence available.

33.4.2 The courts appear generally to have accepted that such interviews will continue to form an important element in the non-legal professionals' investigations and treatment of child sexual abuse and that the role of the courts is limited to drawing such conclusions as to how such interviews may be conducted and presented so as to be forensically useful.⁴⁴

33.5 Canada

33.5.1 One of the earliest decisions with respect to the admissibility of behavioural aspects for child sexual assault arose in **Regina v Beliveau**.⁴⁵ In this case the Court of Appeal drew the distinction between evidence relating to the truthfulness of the witness and evidence supporting

⁴¹ Paper delivered at 2001 National SAPSAC conference by TJ Raulinga, Chief Magistrate Bloemfontein 'Does expert testimony assist judicial officers in arriving at the truth in criminal matters of child abuse?'

⁴² **C v C** (1987) IFLR 321 at 300 per Hollis J as quoted supra.

⁴³ (1989) 2 FLR 145.

⁴⁴ **Re E (A Minor)**(1987) 1 FLR 269.

⁴⁵ (1986) 30 C.C.C. (3d) 193 (B.C.C.A.) as quoted by Raulinga supra.

the offence itself. The mother and a friend testified that the complainant was a truthful child. The Court ruled that this evidence was not admissible. However, the Court found that expert evidence that the child had been sexually assaulted was admissible. The Court went on to find that the content of the expert's interview with the child, including the details of the assault, were admissible as the basis of the opinion, and that the expert was entitled to rely on the behaviour, the demeanor and consistent story of the child to conclude that the complainant had indeed been sexually assaulted.

33.5.2 The Supreme Court of Canada had its first opportunity to review this issue in **Regina v B.(G.)**.⁴⁶ In this case the expert testified about the general behavioural activities of sexually abused children. The Court found that expert evidence should neither be used to bolster the credibility of the witnesses nor to indicate that the complainant should be believed, affirming the principle that credibility is for the trier-of-fact. However, the Court found that expert evidence of this nature was "well within the bounds of acceptable and admissible testimony and that in cases of sexual assault against children the opinion of an expert often proves invaluable". The Court found that expert evidence of the psychological and physical conditions that often arise as a result of sexual abuse, assists the trier-of-fact in determining whether the assault had occurred.

33.5 Submissions received

33.5.1 Not many respondents to the Issue Paper made submissions in respect of expert evidence. However, all those that responded are unanimously in favour of the use of expert witnesses. The **University of the Western Cape Community Law Centre** expresses the opinion that service-providing organisations have noted with concern the reluctance of prosecutors to make use of expert evidence to strengthen the State's case (relating to the merits as well as sentence). In addition, presiding officers often hesitate to recognise counsellors with appropriate experience as experts in the area of Rape Trauma Syndrome. The **SAPS Social Work Services** argue that the process of managing sexual offences can be made better by, *inter alia*, the acceptance of reports and testimonies by experts.

33.5.2 The **Provincial Commissioner SAPS Johannesburg Central** advises that the lack of expert witnesses is often a stumbling block for the State. The use of psychologists, welfare

⁴⁶ (1990) 56 C.C.C. (3d) 200 (S.C.C.) as quoted by Raulinga supra.

officers, doctors and other professionals who are forensically experienced, should be the rule. The **Department of Welfare and Population Development Gauteng Provincial Government** is in favour of specially trained experts (for example, social workers) who should also be empowered to take affidavits from children.

33.6 Evaluation and recommendation

33.6.1 The Commission submits that the purpose of expert testimony in sexual offence cases should not only be to assist the court in understanding the 'common' experiences of sexual offence complainants, but to explain the context in which an individual sexual offence complainant acted and thus to explain the possible reasons for this action. The symptoms, context and circumstances of a sexual offence are complex - the degree and importance of which will vary from case to case - and therefore requires an explanation by way of expert opinion. By allowing the presentation of the individual complainant's perspective in a criminal trial, the presiding officer is informed of the complex dynamics which play a role pursuant to a sexual offence. Without an expert opinion, otherwise legitimate responses to a sexual offence may be interpreted as irrational or confusing conduct on the part of the complainant, thereby affecting the complainant's credibility.

33.6.2 Expert evidence in sexual offence cases is also a logical extension of the prosecution's case against the accused in that it can address issues such as -

- the reasons for delay in reporting or disclosure of a sexual offence;
- the short and long term psychological and emotional effects of a sexual offence on the complainant;
- the statements given at first report to the police and possible inconsistencies in reports made at later stages;
- the reluctance of complainants to testify;
- the disintegration of the complainant just before trial or while testifying;
- the withdrawing of charges;

- corroboration of the complainant's assertion that the conduct was not consensual;
- intimidation;
- risk assessment;
- rehabilitation of the offender; and
- the possible explanation of memory lapses.

33.6.3 An expert could assist the court in arriving at an understanding of the similarities between traumatic symptoms, for example those symptoms associated with Sexual Assault Trauma Syndrome, and the facts in the complainant's case. Expert evidence is particularly crucial in situations where a complainant's actions or responses to a sexual offence departs from the traditional notions of how a sexual offence victim should behave. The expert's knowledge and experience of the effects of a sexual offence on a victim could prove helpful in the dispelling of the myths and stereotypical assumptions about how a sexual offence complainant should behave.

33.6.4 Professors Fouche and Hammond refer to the case of **State v Middleton**⁴⁷ where the court explained the use of expert testimony as follows: ". . . in this instance we are concerned with a child who states she has been the victim of sexual abuse by a member of her family. The experts testify that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful for the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behaviour by identifying its emotional antecedents could help the jury better assess the witness's credibility".⁴⁸

33.6.5 Professors Fouche and Hammond⁴⁹ detail the symptoms of Child Sexual Abuse

⁴⁷ Oregon Supreme Court 1983 cited by Myers 1986 at p 201.

⁴⁸ Fouche and Hammond at p 30.

⁴⁹ At pgs 78 - 80.

Accommodation Syndrome as follows:

- Secrecy: The victim is often drawn into a conspiracy of secrecy by the perpetrator, often based on threats of harm for disclosure. Many studies indicate that most victims of child sexual abuse do not disclose until they are adults. This runs counter to the conventional wisdom that a child would surely report such incidents immediately.
- Helplessness: Recent research shows that a child is three times more likely to be molested by a trusted, familiar caretaker than by a stranger. The child frequently has no real choice, but this is often used against them to show that the child was a willing partner.
- Entrapment and accommodation: The inevitable result of the secrecy and helplessness is that the sexual abuse of the child will continue. The child becomes trapped in the abuse and in order to survive has to find ways of accommodating it. This may involve a reversal of moral standards in which the keeping of the secret becomes a virtue and disclosure a vice.
- Delayed, conflicted and unconvincing disclosure: The above three points explain why in the majority of cases disclosure is not made. However, this may lead to the child engaging in anti-social behaviour. This may lead to conflict at which point the abuse may be disclosed. However, due to the prior anti-social behaviour, the delayed disclosure may well not be believed.
- Retraction: Following disclosure the child may be removed from the family (if the abuse has occurred within the family). Not surprisingly, in that state of turmoil, the child will often retract.

33.6.6 The above exposition clearly illustrates the benefit of having an expert explain the effects of Child Sexual Abuse Accommodation. However, the Commission is aware of the fact that such evidence will not be necessary in each and every case of sexual abuse.

33.6.7 From the above discussion it is also clear that expert evidence should also be led at the commencement of the trial and not just with regard to the impact of the offence on the victim at sentencing or with regard to possible treatment for the offender after sentencing. **In order**

to avoid expert evidence being used solely as impact evidence at sentencing, the Commission recommends that a request for expert evidence be made at the pre-trial phase and that such evidence should be led as early in the trial as possible. The Commission is aware of the fact that expert evidence may be useful in other categories of offences, such as hijacking-anxiety for example. But bearing the sexual offence specific mandate in mind, the Commission is recommending that such a provision should be included in sexual offence specific legislation.

33.6.8 A relatively new category of what would traditionally be labelled a lay witness in the field of sexual abuse of children, is in its infancy within the South African Police Services. Some of the SAPS appointed social workers have undergone forensic training in the field of sexual abuse of children. These forensic social workers assess child sexual abuse victims at the request of the SAPS Family Violence, Child Protection and Sexual Offence (FCS) Units and aim at compiling a neutral report based on the assessment (in other words including facts which are in favour and to the detriment of the state or the defence). No therapeutic service is delivered to the victim. The policy governing these social workers has as one of its goals that the social worker ultimately functions as an expert witness in court based on the assessments made. As these social workers are in the employ of the State, no additional costs are incurred in obtaining the assessments, thereby bringing such assessments within the reach of all victims of child sexual abuse. Due to the fact that they are State employees, the Commission is unsure, however, of the neutrality of the forensic social worker as a witness. **It is provisionally recommended that SAPS re-evaluate the position of these employees and perhaps seek instead to enhance the State's case by using these assessments to assist with the investigation done by the FCS Units. Alternatively, if the objectivity of the forensic social worker's assessment can be established or if the leading of such evidence is agreed to by the defence, the court may even choose to appoint such person as an expert in order to determine whether the child victim is capable of testifying or not.**⁵⁰

33.6.9 In English law, as in South African law, it has been held that expert evidence is only admissible in regard to matters outside 'ordinary human experience'.⁵¹ From the facts in **R v**

⁵⁰ See chapter 36 below with regard to competence.

⁵¹ **R v Turner** [1975] 1 QB 834 at 841 as quoted Lirioka Meintjes-van der Walt 'Science Friction: The nature of expert evidence in general and scientific evidence in particular' (2000) Vol 117 Part 4 **The South African Law Journal** :Juta at 773.

Turner it can be inferred that ordinary human experience is regarded as being fairly wide. However, legal scholars argue that the necessary qualifications of an expert witness have been narrowly defined.⁵² Although the expertise of psychologists and psychiatrists is generally regarded as acceptable in sexual offence cases, particularly dealing with rape, lay counsellors are still generally perceived as unqualified to testify, though they may be suitably trained and have many years of experience working with sexual offence victims. **Holtzhausen v Roodt** signals a welcome change to this state of affairs.

33.6.10 An unwarranted degree of faith in the 'qualifications' of psychologists and psychiatrists to explain the psychological behaviour of a sexual offence complainant may prove fruitless where the theoretical positions used are unsubstantiated by empirical data or even experience in counselling sexual offence victims. In the case of **Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd**⁵³ the court found that "(t)he evidence of the psychologists and linguistic experts tendered . . . was singularly unhelpful". International research is also beginning to challenge the assumption that medical or clinical professionals (psychologists or psychiatrists) are either 'better trained' or better able to provide reliable evidence relating to the behaviour and psychological condition of sexual offence victims than lay counsellors. Studies have shown that there is almost no evidence that psychologists and psychiatrists with extensive experience or special qualifications perform better as expert witnesses in sexual offence trials (specifically referring to rape trials), than other mental health professionals in their area.⁵⁴

33.6.11 **The Commission is of the opinion that the use of experts in the fields of social work, psychology and psychiatry in sexual offence trials should be limited to matters relating to specialised clinical judgement, unless the expert has some specialisation in the area of sexual offences, such as Sexual Assault Trauma Syndrome.** Some confusion as to the role (and credibility) of these professionals in sexual offence cases seems to exist and **the Commission therefore submits that the explanation of the sequelae of behaviour of sexual offence complainants could credibly and reliably be done by trained and experienced lay counsellors.** Another benefit of making use of lay witnesses is

⁵² LH Hoffmann & D Zeffert **The South African Law of Evidence** 4th ed (1988) at 83-104.

⁵³ 1993 (2) SA 307 (A) at 325 E.

⁵⁴ See D Faust & J Ziskin **The Expert Witness in Psychology and Psychiatry** (1988) at 31 -35; D Faust & J Ziskin **Coping with Psychiatric and Psychological Testimony** (1988).

that a lay witness, by contrast, unlike a paid expert witness, usually has no incentive in shading his or her testimony in favour of one or the other side.

33.6.12 The issues of expertise (the extent to which the expert is capable of making correct assertions based on skill, training, knowledge and experience) and trustworthiness (the degree to which the court perceives those assumptions to be valid), will emerge in cross-examination and determine credibility.⁵⁵ The Commission submits that certain lay counsellors have the requisite expertise to render opinions on Sexual Assault Trauma Syndrome and other behavioural issues relating to the responses or actions of a complainant during and after an alleged sexual offence. Prosecutors and judicial officers, however, must be prepared to establish the credibility of counsellors in the courtroom and ask questions designed to demonstrate the competence, expertise and trustworthiness of these witnesses.

33.6.13 From the **Holtzhausen** judgement, one can indeed infer that lay counsellors may qualify as 'experts' and should be recognised by the courts as such. The admissibility of lay counsellor's evidence may thus be relevant to the issue at hand allowing the court to make its own inferences about the likelihood of the sexual offence and the credibility of the complainant. The use of lay counsellors may be of great assistance to the court, provided that -

- they are adequately briefed on the true nature of the legal question or issue they are asked to testify on;
- the court ensures the lay counsellor is not drawing unjustified conclusions for the trier of fact;
- the lay counsellor is not diverted from the question of fact by either the prosecution or the defence;
- the qualifications of lay counsellors as expert witnesses include both specialised training in counselling or assessment of sexual offence victims and experience with sexual offence victims that is current, direct and relevant to the issue or issues considered.

⁵⁵ J Greenberg & A Wursten 'The psychologist and the psychiatrist as expert witnesses: perceived credibility and influence' **Profession Psychology: Research and Practice** Vol 19 (1988) at 373-378.

33.6.14 It seems as though judicial interpretation has not only defined who is an expert, but has also defined those instances where expert evidence is essential. The problem with the admission of expert testimony therefore seems to exist with the interpretation of these rules and not with the rules of the law of evidence. **The Commission recommends that any person who develops a professional and practical understanding of any syndrome or the symptoms associated with sexual offence victims should be allowed to give evidence to this effect.**

33.6.15 Apart from the decision on the admissibility of evidence led by specific experts, two additional problem areas have been identified, namely the leading of conflicting expert evidence by two or more experts, and the inherent contradiction which is presented to the presiding officer having to assess expert evidence. These matters will be dealt with separately below.

33.6.15.1 Meintjes-Van der Walt⁵⁶ states that as specialist evidence becomes an increasingly valuable asset in legal controversies, lawyers in the adversarial system have become aware of the value of expert witnesses who can present their views as the truth. This means that litigation parties may be able to select those witnesses who will serve their cases best. Gross⁵⁷ mentions that the process of obtaining expert witnesses bears two further distinctive features in the adversarial system. First, expert opinion witnesses cannot be compelled to testify. Secondly, expert witnesses are reimbursed for their services. Gross further argues that because expert witnesses are paid witnesses, they can become professional witnesses, perfecting their courtroom performances by repeated practice in order to present their testimony and to achieve the maximum effect.⁵⁸ In the adversarial system in particular, expert evidence is inherently different from other types of evidence. In the ordinary course of events an expert witness need not have any previous contact with the case.⁵⁹ Expert witnesses differ from lay witnesses, who are usually observational witnesses, in that the experts' entire knowledge of the case might have been obtained after they have been enlisted as witnesses.

⁵⁶ L Meintjes-Van der Walt 'Science Friction: The Nature of Expert Evidence in General and Scientific Evidence in Particular'(2000) Vol 117 **SALJ** 771.

⁵⁷ S Gross 'Expert testimony' 1991 **Wisconsin LR** 1125 as quoted by L Meintjes-van Der Walt at 775.

⁵⁸ Ibid.

⁵⁹ L Meintjes-van der Walt at 774.

This means that litigation parties may be able to select those witnesses who will serve their case best.

33.6.15.2 In the same vein, but specifically focussing on the Child Sexual Abuse Accommodation Syndrome, Professors Fouche and Hammond⁶⁰ highlight one danger of the state calling an expert witness to lead evidence within the adversarial system, namely that the defence will then simply call another expert resulting in a battle of the experts, wasting precious resources and time. They argue that in order to circumvent this problem, an expert should be appointed by the court to sit with the judge as an assessor.

33.6.15.3 According to Meintjes-Van der Walt the problem of partisanship does not directly or dominantly present itself in inquisitorial dispensations, where it is the investigating judge and not the parties who decides whether an expert should be consulted or not. The expert reports to the investigating judge and not to the parties.⁶¹ This procedure ameliorates the problem of potential expert bias in criminal dispute resolution.

33.6.15.4 In this regard it is important to note that the current appointment of assessors is governed by section 145 of the **Criminal Procedure Act**, read together with section 93*ter* of the **Magistrates' Courts Act**.⁶² The latter Act provides for the appointment of an assessor in circumstances where the presiding officer "deems it expedient for the administration of justice before any evidence has been led or if considering a community-based punishment"⁶³. In appointing an assessor the presiding officer must take into account a variety of factors. All, except one, focus on the accused, for example the accused's social and educational background.

33.6.15.5 Only subsection 93*ter*(2)(v) refers to any other factor that may be indicative of the desirability of summoning an assessor or assessors. However, where the rest of this section is focussed on the accused, it may be necessary to amend this to reflect the interests of the

⁶⁰ At p 31.

⁶¹ C P M Cleiren and J F Nijboer (eds) **Strafvordering: Tekst & Commentaar** (1999) 464 as quoted in L Meintjes-Van Der Walt 'Science Friction: The Nature of Expert Evidence in General and Scientific Evidence in Particular' 2000 Vol 117 **SALJ** 771 at 774.

⁶² Act 32 of 1944.

⁶³ Section 93*ter*.

State and the victim/complainant. This would encompass an amendment to the **Criminal Procedure Act**, and the **Magistrates' Courts Act** to the effect that when the presiding officer deems it necessary, he or she may appoint assessors with specific experience or expertise in relation to the experience of sexual offence victims.

33.6.15.6 As stated above⁶⁴ another solution would be for the expert to report to the investigating judge and not to the parties. Section 186 of the **Criminal Procedure Act** provides that the court may subpoena a witness. This section reads as follows:

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

33.6.15.7 Du Toit *et al*⁶⁵ states that this section introduces an inquisitorial element into a basically accusatorial system of trial. Also that the function of a judge was described by Curlewis JA in **R v Hepworth**⁶⁶ as follows:

A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that the justice is done.

By employing this provision, the presiding officer is already in a position to call on expert evidence from an independent or any other witness.

33.6.15.8 Alternatively, the possibility of neutral experts deserves consideration. The State and the defence could share the costs of a neutral expert. However, if one of the parties were not amenable to the import of the evidence of a particular expert, the parties may reach a deadlock as to which expert should be allowed to lead evidence. Given the present practice of leading conflicting expert evidence the Commission is not convinced that this is a viable option.

⁶⁴ See paragraph 15.6.12.3.

⁶⁵ At 23 -12 quoting from Hoffman & Zeffert 366; Snyman 1975 **CILSA**; and Hiemstra 385.

⁶⁶ 1928 AD 265 at 277.

33.6.15.9 Leading on from the first problem area discussed above, Meintjes-Van der Walt identifies the second problem area, namely the inherent contradiction facing a presiding officer hearing expert evidence.

33.6.15.10 Meintjes-Van der Walt refers to the 'paradox of expert evidence': the expert is called upon for the very reason that the issue at hand is one that goes beyond the knowledge of the trier(s) of fact, and yet the selfsame tribunal (erstwhile lacking expertise in the field) should then adjudicate upon the matter.⁶⁷ She identifies the inherent contradiction of expert evidence in that expert witnesses are required in matters that go beyond the ordinary understanding of lay people, yet it is expected of a lay judge⁶⁸ to adjudicate on this expert evidence.

33.6.15.11 The Commission concludes that a presiding officer is placed in an unenviable position where experts are called to lead conflicting evidence and he or she is expected to adjudicate the helpfulness and admissibility of this evidence, or in the event where an expert is called to present evidence which is totally outside of the presiding officer's frame of reference. The Commission identifies two possible solutions relating to the introduction of expert evidence in this regard. Firstly, the presiding officer could subpoena an expert as a witness in terms of section 186 of the **Criminal Procedure Act** to present evidence on the symptoms surrounding a sexual offence. Secondly the presiding officer could appoint an expert assessor, in terms of section 145 of the **Criminal Procedure Act**, who specialises in this field and has practical experience with victims of sexual offences. **In concurrence with the above discussion on the use of lay persons being used to give expert evidence, it is also recommended that assessors not be required to have formal qualifications, but preferably have these qualifications coupled to recent practical experience.** Although two options are presented, the Commission wishes to highlight the fact that neither the state nor the defence are precluded from calling their own expert witnesses. If a presiding officer were to follow the first option on its own, he or she could, in the worst case scenario, be presented with three conflicting expert opinions. If the second option is followed, the door is open to employing the first option in addition to the second option. In other words where an assessor is appointed to assist the presiding officer, although the assessor does not lead evidence, he or she may call for evidence to be led by an expert.

⁶⁷ At 790.

⁶⁸ Lay in respect of the particular field of expertise.

33.6.15.12 The Commission encourages South African courts to appoint assessors whose contribution is not limited to their knowledge as it pertains to the accused or criminal law in general, but rather to new fields of endeavour that seek to explain and understand the responses of victims of sexual abuse. **For this reason the Commission recommends specific inclusion in the Criminal Procedure Act of the possibility of an expert leading evidence of the effects of a sexual offence.** The emotional and psychological consequences of sexual abuse are an area outside the knowledge and expertise of most courts. This is particularly important as the emotional responses and consequences of these offences turns conventional wisdom on its head and what would often be regarded as a 'normal' response is in fact most unlikely.

33.6.15.13 The Commission concurs with the opinion that it is not desirable for court time and other resources to be drained by a battle of the experts, but would go further to suggest that the category of assessors need not be limited to a psychologist or psychiatrist, but should involve other professions such as child care workers, social workers, lay ministers, and persons who have experience in dealing with child sexual abuse. However, the Commission would like to sound a word of caution, that it may be just as, or even more harmful, to allow 'expert evidence' on sexual violence where such an expert has no training coupled to practical experience in this field.

33.6.15.14 **The Commission recommends that, wherever necessary, evidence of this nature should be introduced during the State's case and not left to be dealt with only in relation to sentencing.** This would provide the State with the opportunity to "enhance the credibility of the child *and adult* witness where he or she would otherwise be at a disadvantage because of the nature of the victimisation he or she has experienced and the lack of public understanding of the ensuing syndromes".⁶⁹

RECOMMENDATIONS

We recommend that -

1. The Court and Prosecutors recognise the scope, function and utility of lay

⁶⁹ Hammond and Fouche at p30. Italics represents our insertion.

counsellors' expertise in sexual offence trials and make increased use of such counsellors to place expert evidence before court.

2. This amendment should reflect an inclusion of provisions similar in wording to sections 7 and 8 of the Namibian Combating of Rape Act. The Criminal Procedure Act, 1977, is hereby amended by the insertion after section 227 of the following section:

Evidence of psycho-social effects of sexual offence

227A. [1] Evidence of the psycho-social effects of any sexual offence upon a complainant may be adduced at criminal proceedings where such offence is tried in order to -

- [a] show that the sexual act to which the charge relates is likely to have been committed**
 - (i) towards or in connection with the complainant concerned;**
 - (ii) under coercive circumstances as referred to in section 2;**
- [b] prove, for purposes of imposing an appropriate sentence, the extent of the harm suffered by that complainant.**

[2] In determining the weight to be attached to evidence adduced in terms of subsection [1], the court shall have due regard to -

- [a] the qualifications and practical experience of the person who has given such evidence in matters relating to sexual offences; and**
- [b] all other evidence given at the proceedings.**

3. Section 145 of the Criminal Procedure Act 51 of 1977 and section 93*ter* of the Magistrates Court Act 32 of 1944 be amended by inserting a new subsection that provides for the appointment of assessors who have knowledge or experience in dealing with victims of sexual abuse and particularly any syndrome associated with sexual abuse, such as Sexual Assault Trauma Syndrome, Child Sexual Abuse Accommodation Syndrome, or any other related trauma or any other response of a sexual offence victim. Section 145 should be amended to read as follows:

145 [1][b] As assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial; and in the case of an accused charged with the commission of an offence of a sexual nature, has experience and knowledge of -

- (i)** the effects of sexual abuse and trauma related to such abuse upon victims;
- (ii)** any recognised syndrome associated with such abuse and trauma; or
- (iii)** the inclination of a person to commit sexual offences repeatedly.

Section 93ter of the Magistrates' Courts Act, 1944, should be amended to provide as follows:

93ter [1] The judicial officer presiding at any trial may, if he or she deems it expedient for the administration of justice -

- [a]** before any evidence has been led; or
- [b]** in considering a community-based punishment in respect of any person who has been convicted of any offence,

summon to his or her assistance any one or two persons who, in his or her opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded without assessors, whereupon the judicial officer may in his or her discretion summon one or two assessors to assist him or her: Provided further, that if an accused is standing trial on a charge of having committed any sexual offence, whether together with other charges or not, the judicial officer may at that trial be assisted by at least one assessor who has experience and knowledge of -

- [i]** the effects of sexual abuse and trauma related to such abuse upon victims;
- [ii]** any recognised syndrome associated with such abuse and trauma; or
- [iii]** the inclination of a person to commit sexual offences repeatedly.

4. If expert evidence is led by the State, the defence may well wish to do the same. Provision should be made to encourage the use of neutral experts to reduce costs.

CHAPTER 34**ADMISSIBILITY OF PREVIOUS CONSISTENT STATEMENTS****34.1 Introduction and current position**

34.1.1 South African law of evidence prohibits the admission of statements that were made by witnesses prior to their giving evidence during a criminal trial, even where these statements contain the same information as the evidence later given in court.¹ This is described as a rule against 'narrative' or 'self-corroboration'.²

34.1.2 An exception to this common law rule is allowed in rape, indecent assault and similar cases.³ For example, where the complainant makes a statement reasonably soon after the incident, to the effect that she was raped, this 'previous consistent statement' is admissible in court.⁴

34.1.3 In practice, this usually means that the prosecution will call the first person told of the rape by the complainant to describe the circumstances around this complaint to the court. This evidence can make a powerful contribution towards countering a defence of consent.

34.1.4 Requirements for admissibility

34.1.4.1 In order for evidence of an earlier complaint to be admitted, it must have been

¹ See DL Hoffmann & AD Zeffertt **The South African Law of Evidence** 4th ed (1988) at 117; PJ Schwikkard et al **Principles of Evidence** (1997) at 95.

² Hoffmann & Zeffertt *loc cit* note 1; Schwikkard et al *op cit* note 1 at 95-96.

³ Hoffmann & Zeffertt at 119.

⁴ It should be noted that the term 'previous consistent statements' relates to all such statements, irrespective of admissibility. In order to distinguish the specific form of such statements we refer to here (i.e. a report of rape), we employ the term '*earlier complaint*'. This term refers to a so-called 'first' report of the rape, but is not limited to complaints made 'at the first reasonable opportunity'.

made voluntarily and at the first reasonable opportunity.⁵ The determination of what constitutes a 'reasonable opportunity' rests with the presiding officer, and will largely depend on the age and understanding of complainants, and their opportunities for speaking to a person to whom a complaint might 'reasonably' be made.⁶ (Complaints by young children have been admitted in spite of a relatively long lapse of time - for example, a period of six weeks.)⁷ A further requirement for admissibility is that the complainant should testify at the trial.⁸

34.1.5 Origin of the rule

34.1.5.1 The admission of a complaint made at the 'first reasonable opportunity' bears the influence of the English 'hue and cry' rule.⁹ In medieval England it was a defence to an allegation of rape that the complainant had not 'raised the hue and cry' immediately after the alleged offence - in other words, had not raised the alarm immediately after the rape. The complainant was required to 'go at once and while the deed is newly done, with hue and cry, to the neighboring townships and there show the injury done her to men of good repute, the blood and clothing stained with blood, and her torn garments...'.¹⁰

34.1.5.2 By the eighteenth century, it was still regarded as a 'strong but not necessarily conclusive presumption' against a complainant of rape that she had made no complaint in a

⁵ See **R v C** 1955 4 SA 40 (N).

⁶ See Hoffmann & Zeffert *op cit* note 1 at 119.

⁷ **R v T** 1937 TPD 398.

⁸ See eg Schwikkard et al *op cit* note 1 at 99 n 37 and authority cited there.

⁹ See Hoffmann & Zeffert *op cit* note 1 at 118 *et seq*; PJ Schwikkard 'A critical overview of the rules of evidence relevant to rape trials in South African law' in Saras Jagwanth et al (eds) **Women and the Law** (1994) at 199-200; Louise Fryer 'Law versus prejudice: views on rape through the centuries' 1994 **SACJ** 60-77.

¹⁰ H de Bracton **On the Laws and Customs of England** translated by FR Thorne (1968) 415 cited in Schwikkard *op cit* note 8 at 200.

reasonable time after commission of the alleged offence.¹¹

34.1.5.3 According to Schmidt the latest development of this rule is that it is no longer applicable just to rape cases but is now also relevant to other sexual offences. Also that the rationale for the current existence of the rule is to be found in the fact that 'experience' has shown that allegations of sexual misconduct should be treated with suspicion, and the earlier complaint will always be relevant in that it serves to rebut this suspicion.¹²

34.1.6 Value of evidence on earlier complaint

34.1.6.1 An earlier complaint may not be admitted to prove the truth of its contents, but merely to show consistency in the complaint.¹³ While evidence regarding an earlier complaint would usually contribute towards establishing a lack of consent, it will be admissible even if consent is not in issue.¹⁴

34.2 Comparative analysis

34.2.1 Canada

34.2.1.1 Section 275 of the **Criminal Code** expressly abolishes the rules allowing evidence of an earlier complaint to be admissible in rape matters. This places an earlier complaint of rape on the same footing as any other evidence of previous consistent statements: this evidence is generally inadmissible, unless it can be allowed under another exception recognised by the law of evidence.

34.2.2 Namibia

¹¹ Hoffman & Zeffert *op cit* note 1 at 118; Fryer *op cit* note 8 at 73.

¹² CWH Schmidt **Bewysreg** 3rd ed (1989) at 381.

¹³ **R v Kgaladi** 1943 AD 255.

¹⁴ **R v Osborne** [1905] KB 551.

34.2.2.1 The Namibian Law Reform and Development Commission has recognised that the trauma experienced by the complainant may cause her to delay the laying of a complaint. It also notes that it may not always be possible for her to give an explanation for the delay which will be regarded as 'satisfactory' by the court.¹⁵

34.2.2.2 In order to balance this consideration with the accused's right to a fair trial, the Namibian Commission proposed that the court should not assume that a 'late' complaint (in other words, a complaint which is not made at the first 'reasonable' opportunity) would in itself cast a negative light on the complainant's credibility. The court may therefore only draw an inference from a late complaint if it, together with other evidence, suggests that the charge may be false.¹⁶

34.2.2.3 Section 6 of the Namibian **Combating of Rape Act**¹⁷ allows for evidence relating to all earlier complaints made by a complainant to be admissible in rape cases, provided that no inference may be drawn only from the fact that no earlier statements had been made. This means that even where the complainant did not make the complaint at the first 'reasonable' opportunity, this evidence may still be admitted by the court. If the court does allow the evidence, it will not be permissible for the judge or magistrate to assume that the fact that the complainant did not report the rape as soon as possible, implies that she was not raped.

34.2.2.4 In addition, Section 7 of the same Act provides that in criminal proceedings where the accused is charged with rape, the court shall not draw any inference only from the length of the delay between the commission of the act and the laying of a complaint.

34.2.3 Australia

34.2.3.1 In most Australian jurisdictions, the common law rules on earlier complaints (which were essentially the same as the current position in South Africa) have been set aside by laws that require the judge in a rape trial to warn the jury that -

¹⁵ Namibia Law Reform and Development Commission Report on Draft Combating of Rape Bill (July 1997) at 6.

¹⁶ Ibid.

¹⁷ **Combating of Rape Act**, Act No.8, 2000.

- absence of a complaint or delay in complaining does not necessarily indicate that the allegation is false; and
- there may be good reasons why a victim of sexual assault may hesitate in making, or may refrain from making a complaint about the assault.¹⁸

34.2.3.2 It has been found that because these provisions do not preclude judges from commenting on a delay in making a complaint, some judges continue to direct the jury that evidence about the absence of a swift earlier complaint can and should be used to undermine the complainant's credibility.¹⁹

34.2.3.3 By contrast, section 76C of the **Evidence Act** (1971) of the Australian Capital Territories provides that no evidence relating to the making of a complaint (or the terms of such complaint) by the complainant may be admitted in rape trials,²⁰ except if such earlier complaint is admissible under any other legal rule.²¹

34.3 Submissions received

34.3.1 In discussing the rules of evidence the Issue Paper referred to complaints in rape cases. The Issue Paper briefly explained this rule as follows:

The complaint must have been made "without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complainant could reasonably be expected to make it". A great

¹⁸ New South Wales: section 405B of the Crimes Act (1990). See also Tasmania: Section 371A of the Criminal Code Act; Victoria: section 61 of the Crimes Act; Western Australia: section 36BD of the Evidence Act.

¹⁹ Jenny Bargaen and Elaine Fishwick **Sexual Assault Law Reform: A National Perspective** (1995) at 69.

²⁰ Section 76C(1).

²¹ Section 76C(2).

deal depends on the victim's age and understanding.²²

Thereafter the Issue Paper posed the question as to whether there was still a need for this rule of evidence and whether it wasn't just one of the factors a judge or presiding officer should consider in weighing up the evidence.

34.3.2 While a few respondents opine that this rule of evidence is still needed,²³ others express a general concern about the way in which the presence or absence of previous consistent statements is handled especially in relation to a child complainant who may have made conflicting statements.²⁴

34.3.3 Some respondents submit that it is just one of the factors a presiding officer should consider in weighing up the evidence.²⁵ **Ms C Wagner**²⁶ is of the viewpoint that this fact should be considered with the assistance of child care experts.

34.3.4 **Mr AJ Van Wyk** suggests that the question whether there is still a need for this rule of evidence cannot be answered in isolation. In his opinion the actual rule is that previous consistent statements are irrelevant and therefore inadmissible. One of the exceptions to this rule is that evidence of the complaint in certain sexual related crimes is admissible. He concludes that this rule is well settled and when properly handled by investigators and prosecutors, it can swing the scale in favour of a conviction in many cases. It is, in any event, only one of the factors which should be weighed at the end of the day. **JA Van S d'Oliviera, Director of Public Prosecutions** agrees and states that since the rules of evidence dealing with complaints allow in a sense for "self-corroborative" evidence which would otherwise be inadmissible, they can be seen as favouring the prosecution and the *status quo* should be

²² At pp 10.

²³ **JP Swanepoel, Department of Criminal and Procedural Law, UNISA; AJ Van Wyk; Adv K Worrall-Clare.**

²⁴ **Sr Potter: Agape C.P. School; Lerato Soato, Bloemfontein Child and Family Welfare Society; Dr Renee Potgieter and Associates: RP Clinic; Combined comment of the Child Protection Units in Kwazulu Natal.**

²⁵ **Association for Persons with Physical Disabilities Northern Cape; Vryheid Child and Family Welfare Society; Mrs A Dreyer, H Coertze & Ms I Swart, South African National Council for Child and Family Welfare.**

²⁶ **Chief Social Worker, Department of Welfare and Population Development.**

retained.

34.3.5 Many respondents seemed particularly concerned about this rule of evidence in relation to children. **Sr Potter** of the **Agape Cerebral Palsy School** emphasises that children may not always complain immediately after a sexual offence has been committed. **Lerato Soato**²⁷ explains that conflicting statements may arise as children are afraid to answer some questions and they are easily threatened. In the same vein **Dr Renee Potgieter and Associates** of the **RP Clinic** make the following submission:

In practice, we often see how children suffer and deny, disassociate, accommodate and literally flee away from a situation in order not to reveal abuse. Adults are more easily believed than children. Children make a first report and because they are not believed, they either retract the information or deny it, or refuse to make a second report. We recommend that a rule should be made that after a statement on sexual abuse, the child should be protected from not only the alleged perpetrator, but also from any other person who could possibly contaminate the child's statement. This is very important, as many biological mothers prefer to protect the biological father or step-father and could therefore contaminate the child's statement.

34.3.6 **Adv K Worrall-Clare** cautions that traditional attitudes abound about perceived "unnecessary delays". He recommends that each case should be considered subjectively, with the universal understanding that it is never too late to report such a crime. In their combined submission the **GPU's of Kwazulu Natal** state that it has been proven over and over that a rape victim tends not to tell the first person she encounters.

34.3.7 In their joint submission, **Rape Crisis (Cape Town)**, **Community Law Centre**, **University of the Western Cape** and the **ANC Parliamentary Women's Caucus** advise that rape victims and their advocates have expressed concern about the way in which the admission of the victim's "previous consistent statement" has been handled. Further that -

as stated in **R v Kgaladi** [1943 AD 255], this admission merely shows the complainant's consistency, and it implies a greater "burden" on the state. This additional burden comes from the negative inference that may be drawn from the complainant's failure to speak to anyone about what has happened before a formal charge is laid.

The concern is linked to the general concern about the focus in sexual violence cases on the "character" (or "credibility") of the victim rather than on the events which led to laying a charge against someone for rape.

²⁷

Given that sexual violence often occurs in the absence of corroborating witnesses, the admission of a previous consistent statement made by a victim can work to their advantage. Where a victim does speak to a friend, family member, priest or counsellor about what has happened before a charge is laid it is important to retain the legal value of such testimony. In **S v S** [1990 (1) SACR 5 (A)], for example we submit that this kind of testimony did contribute towards the conviction of the perpetrator.

As the South African Law Commission stated in its report on Women and Sexual Offences, it is possible for the defence to exploit either the victim's choice not to discuss the assault, or to use the notion of "reasonable time" to suggest that some disclosures are less valid than others. This is the area in which reform needs to be legislated.

34.4 Evaluation and recommendations

34.4.1 Practical implications of the earlier complaint rule

34.4.1.1 Although the acceptance of evidence on an earlier complaint may have the effect of supporting the complainant's credibility,²⁸ practical experience has shown that the rule is problematic. Where the complainant did not make a statement at what is regarded as 'the first reasonable opportunity', the defence usually succeeds with an argument that a negative inference should be drawn about the credibility of the complainant:²⁹ if the rape really happened, the complainant would have complained as soon as possible.

34.4.1.2 In its 1985 report, the South African Law Commission came to the conclusion that there appeared to be no need for reform in this area of law.³⁰

34.4.1.3 The Commission found that the correct application of the rule could in no way prejudice a rape victim. Where she did complain to someone, this could only benefit the State's case. Where no complaint was laid she would usually be able to give a good reason for not doing so. The Commission further argued that Judges and regional magistrates who try rape cases are, thanks to their wide experience, good judges of character, and that where a witness

²⁸ See, for example, **S v S** 1990 (1) SACR 5 (A), where the evidence of an earlier report contributed towards the conviction of the accused.

²⁹ For example: **R v M** 1959 (1) SA 352 (A). See generally Schwikkard *loc cit* note 9.

³⁰ South African Law Commission **Report on Women and Sexual Offences** (1985) at Par 3.50.

had not complained owing to shock, feelings of guilt or depression, they would be able to make the correct inferences from all the circumstances.

34.4.2 Recognition of recent developments

34.4.2.1 The above finding by the Commission is no longer supported. The fact that a negative inference is accepted at all by the courts, reflects assumptions about the psychological effects of rape and other sexual offences and the conduct expected of a 'reasonable' complainant which are not borne out by recent empirical advances in this area.³¹ It is now widely recognised that there are many psychological and social factors which may inhibit a complainant from reporting a sexual offence 'at the first reasonable opportunity'.³² This militates against the theory that the absence of an earlier complaint should, of necessity, have a negative bearing on the reliability of the complainant.

34.4.2.2 There has been some recognition by the courts of the invalidity of the assumption that 'no earlier report means there was nothing to report'. In the recent judgment in **Holtzhausen v Roodt**,³³ Satchwell J analysed the rules relating to previous consistent statements and confirmed that valid reasons may very well exist for a complainant's failure to report the rape immediately.³⁴ However, this enlightened view is not necessarily the prevailing one.

34.4.3 Options for law reform

34.4.3.1 The manner in which the common law rules governing early complaint evidence have been dealt with in other jurisdictions suggests that there are three possible strategies for reforming the common law:

³¹ See further chapter 33, above on **Expert Evidence**. Specifically sexual assault trauma syndrome and child abuse accommodation syndrome.

³² See Schwikkard *op cit* note 8 at 201 n 17 and authority cited there.

³³ [1997] 2 All SA 552 (W).

³⁴ At 561H-J.

- The first option is for legislation to state clearly that the rule allowing for the admissibility of evidence on earlier complaints should no longer be recognised, and that previous consistent statements may only be admitted under the general rules which allow for the admissibility of previous consistent statements under certain narrowly defined exceptions.

This approach, which would be similar to the measures adopted in Canada and the Australian Capital Territories, implies that no evidence may be led on earlier complaints, unless the evidence falls under one of the other recognised exceptions to the rule that previous consistent statements are inadmissible, for example, where a previous consistent statement is allowed to counter an allegation that the version of the witness is a recent fabrication.

- The second option is to allow evidence of earlier complaints, but to dispense with the rule that the complaint must have been made at the first reasonable opportunity. This option, which is found in Section 6 of the Namibian **Combating of Rape Act**, implies that all earlier complaints, irrespective of any delay in the reporting, would be admissible, provided that the other requirements for admissibility have been complied with. However, this would not eliminate the possibility that the presiding officer may draw a negative inference where there was a delay in making a complaint of rape.
- The third option is to state clearly that such a negative inference may not be drawn only from the absence of a complaint or a delay in making the complaint. It would only be one of the factors the presiding officer should consider in weighing up the evidence. This would retain the present requirement that a complaint must have been made at the first reasonable opportunity, which may result in evidence about the complaint not being admissible and therefore not being placed before court - this would result in the 'absence of a complaint' for purposes of trial evidence. On the other hand, it eliminates a negative inference based *solely* on the timing of the complaint. (It would be problematic to state that the court may never draw a negative inference, since this would interfere with a trial court's broad powers to evaluate evidence.)

Section 7 of the Namibian **Combating of Rape Act** is an example of this option, and is also reminiscent of the provisions found in the Australian state legislation discussed above.

34.4.3.2 We believe that the third option is preferable, because it directly addresses the problem that exists at present, without unduly curtailing judicial discretion to evaluate evidence. Section 7 of the Namibian Act is instructive, in that it effectively combines the second and third options.

RECOMMENDATION

We recommend the inclusion of provisions similar to sections 6 and 7 of the Namibian Combating of Rape Act in the Sexual Offence Act. Our recommendation reads as follows:

Evidence of previous consistent statements

Evidence relating to relevant previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with a sexual offence: Provided that no inference may be drawn only from the fact that no such previous statements have been made.

Evidence of period of delay between sexual offence and laying of complaint

In criminal proceedings at which an accused is charged with a sexual offence, the court shall not draw any inference only from the length of any delay between the alleged commission of a sexual offence and the laying of a complaint in connection with such offence.

CHAPTER 35**HEARSAY EVIDENCE OF CHILDREN****35.1 Introduction**

35.1.1 The competency requirement and the rigours of the adversarial system often prevent children giving evidence in court themselves and historically the hearsay rule made it impossible for other people to repeat in court the accounts children gave them. As a result, where children were found to be incompetent or unavailable to testify, the courts were compelled to deal with acts perpetrated against children without being able to hear the child's version of what occurred. The law in this regard has changed, thereby imbuing the court with a discretion to allow such evidence.¹ Despite this discretion the prevailing view seems to be that children's hearsay evidence in sexual offence matters is not readily received and that if a child is unable to testify the case will rarely be prosecuted.² Although the hearsay rule has a wider application than only that of sexual offences, this chapter will focus on the reception of out of court utterances or statements made by children in sexual offence matters.

35.2 Background and current law

35.2.1 At common law hearsay encompasses oral or written statements made by persons who are not parties and who are not called as witnesses and which are tendered for the purpose of proving the truth of such statements.³

35.2.2 According to Hoffmann and Zeffert⁴ the principal modern justification for the exclusion of hearsay evidence is that hearsay evidence is untrustworthy because it cannot be tested by cross-examination. It is not only that the maker of the statement may have been lying; he or she may simply have been mistaken owing to deficiencies in his or her powers of observation or memory, or he or she may have narrated the facts in a garbled or misleading manner. The

¹ Section 3 of the **Law of Evidence Amendment Act**, Act No 45 of 1988.

² Comment from members serving on the Sexual Offence Project Committee.

³ **S v Holshausen** 1984 (4) SA 852 (A).

⁴ At p125.

purpose of cross-examination is to expose these deficiencies, and if the maker of the statement is not before the court, this safeguard is lost. Hoffmann and Zeffert further explain that the common historical explanation of totally excluding hearsay evidence is that a jury could not be relied upon to assess its weight properly. They continue by quoting Lord Devlin:

“... I cannot see why these considerations should any longer apply to matters that are being determined by a judge alone.”⁵

Hoffmann and Zeffert endorse this statement and note that the common law rule prevented the court from discovering the truth in cases where no conceivable policy could have justified its application.⁶

35.2.3 In 1988 the **Law of Evidence Amendment Act**⁷ came into force and abolished the common law relating to hearsay evidence.⁸ In terms of section 3 thereof the court now has a discretion to admit hearsay evidence. It provides as follows:

“3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to -
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
 is of the opinion that such evidence should be admitted in the interests of justice.

⁵ Devlin LJ in **Bearmans Ltd v Metropolitan Police District Receiver** [1961] 1 All ER 384 at 392.

⁶ At p126.

⁷ Act 45 of 1988.

⁸ Schwikkard et al **Principles of Evidence** at p 162.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section -
 “hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
 “party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”

35.2.4 Section 3 of the above Act was enacted after numerous calls for change. Notably, Professors Fouche and Hammond⁹ held that reform was especially necessary in cases dealing with child victims who are very young and have limited language skills. They further noted that the majority of child victims are below the age of three.¹⁰

35.2.5 Despite the above amendment, Zieff¹¹ submits that on a proper construction of the provisions of section 3(1)(c) of the **Law of Evidence Amendment Act**, he is left doubtful as to whether the court would utilize the wide ambit of the provision to introduce evidence of a child victim who is not found competent to testify or is too traumatised or young to testify. In his opinion it would mean that every cardinal principle of the fair criminal trial would be thwarted - admitting the out-of-court statements of the child victim without his or her presence in court would negate basic procedure principles such as the accused's right to confrontation or cross-examination and would upset the balance between society's compelling need to protect the child abuse victim from further psychological and emotional harm and the need to preserve the rights of the defendant.

35.2.6 Zieff suggests¹² that the South African legislature apply its mind to the creation of an additional statute regulating the admissibility of extra-judicial declarations of unavailable child

⁹ **The Child Witness** University of Natal 1987.

¹⁰ Ibid at pg 35.

¹¹ At 31.

¹² At 33.

witnesses. He refers¹³ to the Washington statute, whereby evidence which is sufficiently reliable may be admitted if the child testifies at a trial and is subject to cross-examination. If, however, the child is unavailable as a witness, the hearsay can only be admitted if there is corroborative evidence of the act. He explains that the corroboration requirement is in addition to the reliability requirement and that to his mind corroborative evidence includes eyewitness testimony, an admission or confession by the defendant, physical evidence that the child was abused, expert psychological testimony that the abuse occurred or any other independent evidence which corroborates the child's statement.

35.2.7 He submits further that if and when hearsay statements by a child are offered and challenged, the court should consider all relevant criteria, including the basis for the child's unavailability and how that might bear on reliability, and the possibility that a domestic dispute or some other external influence might be the source of the child's allegations.

35.3 Comparative analysis

35.3.1 Canada

35.3.1.1 According to the Ontario Law Reform Commission **Report on Child Witnesses** the spontaneous declaration exception to the common law hearsay rule was considered the most promising in terms of its applicability to the statements of children. However, the Commission states that an interpretation placed on spontaneous declarations by the Supreme Court of Canada¹⁴ created substantial obstacles to the admissibility of hearsay statements of children under this exception. In the Supreme Court of Canada decision **Khan v The Queen** the accused physician was charged with sexually assaulting his three and a half-year-old patient. Fifteen minutes after leaving the accused's office, the child described the sexual act to her mother. The court refused to allow the child's statement to her mother to be admitted under the spontaneous declaration exception to the hearsay rule on the basis that they were not contemporaneous with the event and that the child was not competent to give unsworn evidence.

35.3.1.2 On appeal from the Court of Appeal for Ontario the court held that the appeal

¹³ At 32.

¹⁴ **Khan v The Queen** [1990] 2 S.C.R. 531, 79 C.R. (3d).

should be dismissed in that the court found that the trial judge had erred in applying the more strenuous test for admission of sworn testimony when considering the admission of the child's unsworn evidence, and had erred when considering the admissibility of the spontaneous statements in not allowing greater latitude with respect to the lapse of time between the event and the declaration.¹⁵ The court also opined that a judge, conducting an inquiry of this nature, involving a child of tender years who is too young to testify in the inquiry, can receive hearsay evidence and rely upon such evidence in coming to the decision as to whether or not the child is in need of protection. The court further found that, in determining the admissibility of the evidence, the judge must have regard to the need to safeguard the interests of the accused. It reasoned that in most cases a right of cross-examination would not be available. If the child's direct evidence in chief is not admissible, it follows that his or her cross-examination would not be admissible either. In conclusion the court stated that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.

35.3.1.3 Subsequently, in order to promote the "truth-seeking" goal of the criminal process, the Canadian courts have focused at least in part on the protection of children as a reason for modifying the rule that prevented children's out-of-court statements to third parties from being admitted into evidence (the "hearsay" rule).¹⁶ Recently in the case of **Regina v Burk**¹⁷ the trial judge permitted the Crown to lead evidence of a four-year-old child's out-of-court statements, including an oral statement made to her grandmother as well as the utterances made by the child to the police officer as transcribed from the videotaped statement.

35.3.1.4 The hearsay exception has also been extended by the Supreme Court of Canada to cases where a witness does testify, but recants a previous out-of-court statement. The inability to obtain the evidence of a recanting witness is sufficient to establish the necessity of receiving the hearsay statement. Sufficient circumstantial guarantees of the statement's

¹⁵ [Http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/html/1990scr2_0531.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/html/1990scr2_0531.html) as of 22 May 2001.

¹⁶ [Http://canada.justice.gc.ca/en/cons/child/consul3.html](http://canada.justice.gc.ca/en/cons/child/consul3.html) dated 29 November 1999.

¹⁷ 139 C.C.C. (3d) 266 as cited at <http://www.yorku.ca/dmartin/Evidence/Cases/Burk.htm> .

reliability are still required.¹⁸

35.3.1.5 The **Child Victim Consultation Family, Children and Youth Section** opines that without a videotape, the court must rely on another witness to recount the child's out-of-court statement and describe the child's demeanor. However, it found that it is arguable that there is no reason in principle to distinguish an out-of-court record in writing or memory from one on videotape, if there are circumstantial guarantees of its reliability.¹⁹

35.3.2 New Zealand

35.3.2.1 The New Zealand Law Commission²⁰ argues that in general, not just with regard to criminal proceedings related to a sexual offence, the hearsay rule is in need of fundamental reform. After exploring the advantages and disadvantages of abolishing or rationalising the hearsay rule, the New Zealand Law Commission concludes that in the interests of both the accused and the prosecution, it is preferable to retain some version of the rule. This in turn requires the imposition of a positive standard or standards for hearsay evidence. In criminal proceedings the preliminary paper follows the option of rationalisation of the rule, coupled with procedural safeguards.²¹

35.3.2.2 The New Zealand Law Commission reasons that any rationalisation of the hearsay rule in criminal cases should proceed on the basic principle that logically relevant evidence is to be admissible unless there is good policy reason to exclude it. Consistent with that, reform of the law should aim to eliminate the present technical, confusing and inconsistent approach to the exceptions to the rule against hearsay.

35.3.2.3 The Commission has opted to include a rationalised version of the hearsay rule in the proposed Evidence Code. The purpose of the proposed Evidence Code is to replace most of the existing common law and statutory provisions on the admissibility and use of

¹⁸ Ibid at pp 7.

¹⁹ [Http://canada.justice.gc.ca/en/cons/child/consul3.html](http://canada.justice.gc.ca/en/cons/child/consul3.html) at pp 7.

²⁰ Preliminary Paper No 15 **Evidence Law: Hearsay** a discussion paper Wellington New Zealand 1991.

²¹ At pg 13.

evidence in court proceedings.²² The Code regulates hearsay evidence as follows:

Subpart 1 - Hearsay Evidence

16 Interpretation

- (1) In this subpart, **circumstances relating to the statement** include
- (a) the nature and contents of the statement; and
 - (b) the circumstances in which the statement was made; and
 - (c) any circumstances that relate to the truthfulness of the maker of the statement; and
 - (d) any circumstances that relate to the accuracy of the observation of the maker of the statement.
- (2) The maker of a statement is **unavailable as a witness** for the purposes of this Subpart if the maker
- (a) is dead; or
 - (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
 - (c) is unfit to be a witness because of age or physical or mental condition; or
 - (d) cannot with reasonable diligence be identified or found; or
 - (e) is not compellable to give evidence.
- (3) Notwithstanding subsection (2), the maker of a statement is not to be regarded as unavailable as a witness if the unavailability was brought about by the party offering the statement for the purpose of preventing the maker of the statement from attending or giving evidence.

17 Hearsay rule

Hearsay is not admissible except

- (a) as provided by this Subpart or any other Act; or
- (b) where this Code provides that this Subpart does not apply and the hearsay is both relevant and not otherwise inadmissible under this Code.

19 Hearsay in criminal proceedings

In a criminal proceeding, hearsay is admissible if

- (a) the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable; and
- (b) either
 - (i) the party who proposes to offer the hearsay as evidence gives notice of the proposal in accordance with section 20(1); or
 - (ii) the requirement to give notice is waived by all other parties to the proceeding; or
 - (iii) in accordance with section 20(3), the judge dispenses with the requirement to give notice; and
- (c) either
 - (i) no party has given notice of objection under section 20(2) or otherwise objects to the admission of the statement as evidence;

²²

- or
- (ii) the maker of the statement is unavailable as a witness; or
- (iii) requiring the maker of the statement to be a witness would cause undue delay or expense.

(Note: this section does not apply to evidence of a defendant's statement offered by the prosecution in a criminal proceeding.)

20 Notice of hearsay in criminal proceedings

- (1) A notice of a proposal to offer a hearsay statement as evidence in a criminal proceeding must be given
 - (a) in writing to every other party to the proceeding and include the contents of the statement and, subject to the terms of any witness anonymity order, the name of the maker of the statement; and
 - (b) a sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.
- (2) A party to a criminal proceeding who is given notice of a proposal to offer a hearsay statement as evidence must, if that party objects to the admission of the statement as evidence, give notice of objection as soon as practicable to the party proposing to offer the statement.
- (3) The judge may dispense with the requirement to give notice under subsection (1) or (2)
 - (a) if having regard to the nature and contents of the hearsay statement, no party is substantially prejudiced by the failure to give notice under subsection (1); or
 - (b) if giving notice was not reasonably practicable in the circumstances; or
 - (c) in the interests of justice.

The hearsay rule was redefined to encompass only statements made by non-witnesses. A witness is defined as a person who gives evidence (which may be orally, in an alternative way or in written form) and is able to be cross-examined. This approach, which places considerable importance on the possibility of cross-examination, reflects the Law Commission's view that the lack of the opportunity to test a witness's evidence in cross-examination is the most compelling reason for limiting the admissibility of hearsay evidence.²³

What is treated as hearsay under the New Zealand Code is determined by the definition of "statement".²⁴ The Code's definition excludes what are known as "implied" and "unintended" assertions from the operation of the hearsay rule. The reasoning is that it should be left to the fact-finder to draw inferences from evidence of reported conduct. The categories of

²³ New Zealand Law Commission **Evidence** Report 55 - Volume 1 Reform of the Law at p14.

²⁴ See further section 4 of New Zealand Evidence Code.

“unavailability” listed in section 16(2) follow those in section 2(2) of the **Evidence Amendment Act** (No 2) 1980, extended to cases of extreme youth as well as old age. Trauma, or the severe impairment of a statement maker’s emotional state will make it necessary for the judge to consider under paragraph (c) whether the maker is unfit to attend because of his or her mental condition, particularly if the maker is a child. The admissibility rules for hearsay evidence in both civil and criminal proceedings are based first on an assessment of reliability.

35.3.3 Scotland

35.3.3.1 The Scottish Law Commission has also considered whether hearsay which is inadmissible under their law is justifiably excluded. The investigation starts from the point of view that the law should be as clear and simple as possible and that all relevant evidence should generally be admissible.²⁵ After a thorough investigation of the relevant law, the bewilderingly conflicting decisions of the European Court of Human Rights and policies for the reform of the hearsay rule, they conclude by confirming the traditional preference for direct oral evidence over hearsay. However, the prosecution and defence are provided with new categories of exceptions to the hearsay rule which will allow hearsay evidence of a statement to be admitted if there are truly insurmountable difficulties in the way of obtaining evidence of the maker of the statement from the maker personally, on oath or affirmation in the presence of the jury and subject to cross-examination.

35.3.3.2 This change was motivated by the fact that the Scottish Law Commission is of the opinion that the need for the information the maker is able to give outweighs the disadvantages of hearsay evidence in the search for the truth of the matters in issue before the court.

35.3.3.3 The Scottish Law Commission reject the attempt by Wigmore²⁶ in the United States of America to show that the exceptions to the hearsay rule could be justified by both necessity and reliability.²⁷ They conclude that hearsay evidence is excluded not because it is

²⁵ Scottish Law Commission **Evidence: Report on Hearsay Evidence in Criminal Proceedings** 22 February 1995 at p 13.

²⁶ Wigmore J H A **Treatise on the Anglo-American System of Evidence in Trials at Common Law** 3rd edition 1940 paras 1420-1423.

²⁷ Law Commission **Evidence: Report on Hearsay Evidence in Criminal Proceedings** at p 31. Similarly rejected by New South Wales Law Reform Commission **Report on the rule against**

unreliable, but because it is not possible to test its reliability by cross-examination.²⁸ Hearsay evidence which might be admitted on the ground of necessity might vary in reliability, just as direct oral evidence does. In order to take account of this consideration, the Scottish Law Commission proposes that evidence should be admissible as to the credibility of the maker of the statement and the circumstances in which he or she made the statement and observed the facts mentioned in it.²⁹

35.3.4 United Kingdom

35.3.4.1 In 1994 the British Law Commission were tasked by the Secretary of State for Home Affairs to consider the law of England and Wales relating to hearsay evidence. In so doing the British Law Commission found that a comprehensive and comprehensible law of hearsay would create far less scope for argument at trial and make it much easier for the law to be explained to the fact-finders.³⁰ Also, that the law of hearsay should be comprehensive, and this means that the extent of the rule, as well as all exceptions to it, should be embodied in the relevant statutory provisions.³¹

35.3.4.2 Section 1 of the Draft Bill proposed by the British Law Commission defines hearsay as follows:

1. (1) In criminal proceedings a statement not made in oral evidence in the proceedings is not admissible as evidence of any matter stated unless -
 - (a) this Act or any other statutory provision makes it admissible,
 - (b) any rule of law preserved by section 6 makes it admissible, or
 - (c) all parties to the proceedings agree to it being admissible.

Section 3 governs the exceptions to the hearsay rule as follows:

Hearsay Evidence (LRC 29, 1978) para 1.2.17.

²⁸ Scottish Law Commission **Evidence: Report on Hearsay Evidence in Criminal Proceedings** at p 31.

²⁹ Scottish Law Commission **Evidence: Report on Hearsay Evidence in Criminal Proceedings** at p 31.

³⁰ Law Commission **Evidence in Criminal Proceedings: Hearsay and related topics** (Law Com No 245) London 1997

³¹ *Ibid* at p 4.

3. In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if -
 - (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
 - (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and
 - (c) any of the five conditions mentioned in section 5 is satisfied (absence of relevant person etc.)

Section 5 lists the five conditions referred to in section 3 as follows:

- 5
 - (1) Here are the five conditions referred to in sections 3 and 4.
 - (2) The first condition is that the relevant person is dead.
 - (3) The second condition is that the relevant person is unfit to be a witness because of his bodily or mental condition.
 - (4) The third condition is that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance.
 - (5) The fourth condition is that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken.
 - (6) The fifth condition is that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings -
 - (a) at all, or
 - (b) in connection with the subject matter of the statement and the court gives leave for the statement to be given in evidence.
 - (7) For the purposes of subsection (6) "fear" must be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.
 - (8) Leave may be given under subsection (6) only if the court considers that the statement ought to be admitted in the interests of justice, having regard
 - (a) to the statement's contents,
 - (b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how likely it is that the statement can be controverted if the relevant person does not give oral evidence),
 - (c) in appropriate cases, to the fact that special arrangements could be made for the relevant person to give evidence (for example, through a television link or from behind a screen), and
 - (d) to any other relevant circumstances.
 - (9) A condition which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in it are caused -
 - (a) by the person in support of whose case it is sought to give the statement in evidence, or
 - (b) by a person acting on his behalf,
 In order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).

35.3.4.3 No provision has been made in the Bill to admit statements made by children to

third parties. However, the 'recent complaint' doctrine provides that a complaint by the alleged victim shortly after a sexual offence is admissible as part of the prosecution's case. It is evidence, not of the truth of the matters complained of, but of the fact that the alleged victim's conduct in complaining was consistent with his or her testimony, and so is an exception to the general ban on prior consistent statements.³² Only two avenues exist to keep a child out of the trial process, both of which are rarely used.³³ Firstly, sections 42 and 43 of the **Children and Young Persons Act** 1933 make a pre-trial deposition of a child victim before a justice of the peace admissible in evidence on behalf of the prosecution or the defence in circumstances where the court is satisfied on the evidence of a qualified medical practitioner that the child's attendance before the court would involve 'serious danger to his life or health'. The prosecution must prove that the defence was afforded the opportunity to cross-examine the child. Secondly, the **Criminal Justice Act** 1988 in section 23(3) creates a statutory exception to the hearsay ban for statements to an investigator where the person who made the statement does not give oral evidence 'through fear, or because he is kept out of the way'. However, the court has residual discretion under section 25 of the Act to exclude a hearsay statement if it is of the opinion that in the interest of justice it should not be admitted, having regard to the nature and source of the hearsay evidence; the extent to which it appears to supply evidence which otherwise would not be readily available; its relevance; and the risk of unfairness to the accused.

35.3.4.4 In the **Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System**,³⁴ the Working Group considered those aspects of the British Law Commission's hearsay report which relate to vulnerable or intimidated witnesses. The Working Group recommends that where a witness refuses to testify through fear, the admission of his or her written statement should be governed by criteria similar to that proposed by the Working Group for the use of other measures, i.e. that the court must be satisfied that the person would be likely to be so intimidated or distressed as to be unable to give best evidence and that the fear could not be overcome by using any of the other measures. The Working Group further believes that the admission of a written statement,

³² Davis et al **An Assessment of the Admissibility and sufficiency of Evidence in Child Abuse Prosecutions** A research report for the Home Office: Department of Law University of Bristol 1999.

³³ Ibid at p 17.

³⁴ **Speaking Up For Justice** Home Office 1998.

without the opportunity for the witness to be cross-examined, should be regarded as a last resort.³⁵

35.3.5 Australia

35.3.5.1 In Tasmania there are a number of exceptions or apparent exceptions to the hearsay rule which may be relevant in cases where children are victims of assault.³⁶ They are listed as follows:

- Evidence of a complaint recently or promptly made by the victim of sexual assault is admissible in criminal prosecutions for sexual offences, but the evidence is not evidence of the facts related in the complaint. It is only admissible as to the credit of the complainant and it can only be admitted if the complainant is a witness. Nor can it be relied upon to corroborate the complainant's testimony.
- Spontaneous utterances made by a child shortly before or after a sexual assault are admissible under the *res gestae* doctrine and constitute an exception to the hearsay rule. The usefulness of this exception in child abuse cases is strictly limited by the requirements of contemporaneity of the statement and other evidence of the assault in the case of the common law rule, and in the case of the Tasmanian statutory exception, by the conditions that the maker testifies or is 'unavailable'.³⁷
- In the rare instance that the child alleges in the presence of the accused that the accused assaulted him or her, evidence of the contents of that statement may be given by a witness and if the accused acknowledged its truth by words or conduct, it is admissible; if not, it must be disregarded.
- The evidence of a previous identification of the accused by a child victim of assault may be given by another witness who witnessed the identification if the

³⁵ Ibid at p90.

³⁶ Kate Warner **Child Witnesses: Evidentiary Reforms** University of Tasmania Hobart at p171.

³⁷ Section 81 F **Evidence Act 1910 (Tas)**.

child is called as a witness and identifies the accused in court and testifies as to their previous identification.

- Section 81B of the **Evidence Act 1910 (Tas.)** allows documentary evidence of a statement to be admitted. Although of great potential in a child sexual assault prosecution, it is limited, of course, to documentary evidence and by the requirements that the incident be 'fresh in the memory' of the witness, that the child be called as a witness and at least attempt to give oral evidence of the incident in examination-in-chief as well as being available for cross-examination. The provision has been used when a child victim of sexual assault has refused to describe in evidence-in-chief what the accused did to him or her, but will agree that his or her original statement given to the police is accurate.

35.3.5.2 Despite the above exceptions, the hearsay rule has been widely criticised in Tasmania for many years.³⁸ The rule has been found to be complex, technical, artificial and sometimes operates to exclude evidence of substantial probative value. Warner³⁹ opines that in cases of sexual offences against children, because of retraction, or difficulty in testifying, second-hand accounts may be more reliable than first-hand accounts, or a first-hand account may be unavailable because the child is unable to testify. Also, that by allowing a witness to repeat the child's account of the details of the assault or to produce a videotape of the child's account, trauma to the child would be significantly reduced.

35.3.5.3 The Australian Law Reform Commission⁴⁰ has suggested substantial reform to the hearsay rule. The general rule excluding hearsay is affirmed but a revised and simpler category of exceptions is proposed. In its application to child witnesses, the exception in relation to first-hand hearsay would enable oral or documentary evidence of a child victim's representation made when the facts asserted were fresh in the child's memory to be admitted in evidence in civil and criminal cases if the child is called as a witness. A document, which includes a video recording, could not be tendered before the end of the examination-in-chief of the child. Proofs of evidence are expressly excluded from this category of evidence in

³⁸ Kate Warner **Child Witnesses: Evidentiary Reforms** University of Tasmania Hobart at p172.

³⁹ At 172.

⁴⁰ **Evidence** Report No. 26, paras 686-700; **Evidence** Report No. 38, para. 142.

criminal cases. In the case of an unavailable child (a witness is unavailable *inter alia* if not competent to give evidence), oral or documentary evidence of a child's representation would be admissible in civil cases and criminal cases, if in the case of criminal proceedings the representation was made at or shortly after the time the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or if made in the course of giving sworn evidence in legal proceedings if the defendant had a reasonable opportunity to cross-examine the child.

35.3.6 United States of America

35.3.6.1 According to Warner,⁴¹ a new hearsay exception was enacted in Washington providing for the admissibility in criminal proceedings of a statement made by a child under the age of 10 describing any act of sexual contact performed with or on a child by another if the court finds that there are sufficient indications of reliability and the child either testifies at the proceeding or is unavailable as a witness. If the child is unavailable, corroboration is required.

35.3.6.2 In 1985 Florida enacted a more detailed hearsay exception which is applicable in criminal and civil proceedings to the statement of a child victim of a developmental age of 11 or less describing any act of child abuse. In the Florida provisions 'unavailability' is defined to include a finding by the courts that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm. A number of the states have enacted similar hearsay exceptions.

35.3.6.3 The **Illinois Criminal Sexual Assault Act** provides⁴² in 725 ILCS 5/115-10 specifically for certain hearsay exceptions for children under the age of 13. The provisions read as follows:

- (a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13, or a person who was an institutionalized severely or profoundly mentally retarded person at the time the act was committed, including but not limited to prosecutions for violations (of provisions of the Criminal Code)..... the following evidence shall be admitted as an exception to the hearsay rule:
 - (1) testimony by the victim of an out of court statement made by the victim that he

⁴¹ At 173.

⁴² Illinois Coalition Against Sexual Assault 1998.

- or she complained of such act to another; and
- (2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.
 - (b) Such testimony shall only be admitted if:
 - (1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provided sufficient safeguards of reliability; and
 - (2) The child or institutionalised severely or profoundly mentally retarded person either:
 - (A) testifies at the proceeding; or
 - (B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement; and
 - (3) In a case involving an offense perpetrated against a child under the age of 13, the out of court statement was made before the victim attained 13 years of age or within 3 months after the commission of the offense, whichever occurs later, but the statement may be admitted regardless of the age of the victim at the time of the proceeding.
 - (c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the institutionalised severely or profoundly mentally retarded person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

35.4 Evaluation and recommendations

35.4.1 The Law Reform Commission of Western Australia has shown that the hearsay evidence of a child may constitute the best evidence of the subject matter that is being litigated.⁴³ The Ontario Law Reform Commission has found that many involved in the legal system, including child psychologists and psychiatrists, believe that the spontaneous statement of a child is generally extremely accurate.⁴⁴ Another reason put forth by the Ontario Law Reform Commission for admitting out of court statements of a child is that these statements may be the only substantive evidence of the subject of the proceedings. In cases of physical or sexual

⁴³ Law Reform Commission of Western Australia Discussion Paper on **Evidence of Children and other Vulnerable Witnesses** Perth, Australia: April 1990, at p13 as quoted in the Ontario Law Reform Commission **Report on the Child Witness** at p50.

⁴⁴ Ibid.

abuse, for example, the evidence of a child is often the primary and sole evidence.⁴⁵ The Commission quotes an apt unreported judgement:

[when] proceedings concern the best interests, safety, and in some cases, the life of a child [g]iven the enormous importance of such issues, the rules of evidence should stand aside when they would prevent the Court from hearing all the available evidence which might assist in determining the appropriate result.⁴⁶

35.4.2 A further reason for the liberalisation of the hearsay rule respecting the statements of children, is the desire to spare the child the traumatic experience of testifying in court.

35.4.3 Over the last ten years, most common law jurisdictions have proposed reforming the rule against hearsay,⁴⁷ many of the amendments being motivated by the arguments stated above. In the same vein, by way of legislation, section 3 of the **Law of Evidence Amendment Act** has brought about a relaxation of the hearsay rule in South Africa. The common law on hearsay, which together with the cautionary rules were often applied together to exclude the hearsay evidence of children, has clearly been repealed.

35.4.4 Zieff⁴⁸ submits that in South Africa there is only one vehicle to admit hearsay evidence of the child victim - namely section 3(1)(c) of the **Law of Evidence Amendment Act**. The Commission agrees that section 3(1)(c) is the appropriate mechanism to be employed to admit hearsay evidence of a child victim. The Commission is of the view that the requirements of sections 3(1)(a) and (b) will generally not be met in sexual offence matters. In respect of section 3(1)(a) it is highly unlikely that the accused would agree to the admission of this evidence knowing that if he or she disagreed, the evidence would be disallowed. In respect of subsection 3(1)(b) this would presuppose that the child testifies at the proceedings, whereas the child may not be able to or is found not to be competent to testify. Section 3(1)(c) imbues the court with a wide discretion to allow the admission of hearsay evidence after a consideration of several

⁴⁵ Ontario Law Reform Commission **Report on Child Witnesses** at p51.

⁴⁶ **Re Kathleen R** unreported (August 31, 1983, Ont.Prov.Ct., (Fam. Div.)), at 14 per Thomson J as quoted at p51.

⁴⁷ New Zealand Law Commission **Evidence** Report 55 - Volume 1 Reform of the Law at p 13.

⁴⁸ 'The child victim as witness in sexual abuse cases - a comparative analysis of the law of evidence and procedure' 1991 **SACJ** 4 at 21.

factors if it is in the interests of justice.⁴⁹ De Vos notes⁵⁰ that although section 3(1)(c) does not expressly include any of the common law exceptions to the hearsay rule, evidence that would have been allowed under these exceptions will still be allowable by virtue of the discretion now vested in the court.

35.4.5 However, De Vos cautions that the success with which this provision will be applied in practice is entirely dependent on the inclination or disposition of the bench. De Villiers⁵¹ agrees by stating that when the court is faced with using this discretion, it must alert itself to the danger of merely falling back onto the familiar ground of the common law rule and its exceptions. He explains that the legislature stepped in to address problems experienced by the common law rule and its exceptions and that the courts must not attempt to model section 3(1)(c) onto the repealed common law.

35.4.6 In the course of this investigation it has become clear to the Commission that certain evidentiary and procedural rules have frustrated the effective prosecution of sex offenders while submitting the complainant, child and adult alike, to a prolonged ordeal in court or denying the complainant access to justice due to the fact that important evidence, was disallowed. Many adjustments to the law have already been made to ameliorate this situation. However, despite the recent law reform regarding the admissibility of hearsay evidence uncertainty seems to exist as to whether the court will exercise its discretion in terms of section 3(1)(c) of the **Law of Evidence Amendment Act** so as to allow the hearsay evidence of children who do not testify in the proceedings. It is clear that a presiding officer may admit such evidence if the criteria in section 3(1)(c) of the abovementioned Act is met. From the lack of reported judgements relating to this aspect of the law, it is unclear whether a problem indeed exists in practice and, if so, whether the hearsay evidence of children is being excluded by presiding officers who are not exercising the discretion given to them in terms of the abovementioned Act or whether presiding officers are not afforded the opportunity of exercising this discretion as a result of prosecutors not pursuing cases of child sexual abuse where the child is not available or able to testify. Prosecutorial uncertainty as to whether the court will exercise its discretion in favour of admitting hearsay evidence could impact negatively on the prosecutor's decision as to

⁴⁹ W Le R De Vos 'Enkele beskouinge oor die Wysigingswet op die Bewysreg, 45 van 1988, vir sover dit die hoorsêreël betref' 1989(2) **TSAR** at 235.

⁵⁰ Ibid.

⁵¹ D De Villiers 'Nuwe Hoorsê in 'n Ou Baadjie' 1994 **De Jure** Vol 1 pp183.

whether to proceed to trial.

35.4.7 The Commission is mindful of the words of caution sounded by Zieff, De Vos and De Villiers, but is of the opinion that the existing legal vehicle for allowing hearsay evidence seems to be in line with, if not actually ahead of, an international move towards admitting such evidence and in fact seems to be more lenient than the provisions contained in comparable jurisdictions. If the very wide criteria of section 3 of the **Law of Evidence Amendment Act** are met, the hearsay evidence of children and adults who are unable to testify by reason of, for example, incompetence or mental incapacity, could be admitted by a presiding officer exercising his or her discretion in this regard. The Commission is not in favour of recommending amendments to legislation, with the sole purpose of stating the obvious, i.e, that the hearsay evidence of children in sexual offence matters who are unable to testify may be admitted if the evidence meets the criteria set in section 3 of the above Act. The Commission also does not see a need at this time for the creation of an additional statute to regulate the admissibility of extra-judicial declarations of unavailable child witnesses as recommended above, due to the fact that such evidence is already admissible in terms of the Act under discussion and that it would be highly unlikely for a presiding officer to convict an accused solely on such evidence. The Commission is of the opinion that corroborative evidence of the offence would be required thereby protecting the countervailing interests of the accused.

35.4.8 However, in light of the apparent disparity between the *de facto* and *de iure* position relating to the admissibility of hearsay evidence in sexual offence matters, the Commission welcomes submissions pertinent to this issue.

35.4.9 The Commission also wishes to elicit comment as to whether the definition of 'hearsay evidence' as contained in section 3(4) of the **Law of Evidence Amendment Act** should be amended in keeping with advancing technology. Currently it is defined as follows:

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

The Commission is aware that account needs to be taken of the role of computer technology particularly in relation to child pornography and pedophile use of the Internet. This matter will receive the Commission's attention in the fourth discussion paper on sexual offences.

CHAPTER 36**THE NECESSITY OF A FINDING OF COMPETENCE BEFORE TESTIFYING AND THE CORROBORATION OF UNSWORN EVIDENCE****THE NECESSITY OF A FINDING OF COMPETENCE BEFORE TESTIFYING****36.1 Introduction and current position**

36.1.1 The principle method of adducing evidence is by oral testimony of a competent witness. The general rule is that everyone is presumed to be a competent witness. Section 192 of the **Criminal Procedure Act 1977** reads as follows:

Every person not expressly excluded by this Act from giving evidence shall, subject, to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

36.1.2 Subsequently section 206 of the **Criminal Procedure Act** reads as follows:

The law as to the competency, compellability and privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May 1961, shall apply in any case not expressly provided for by this act or any other law.

36.1.3 Hoffmann and Zeffert interpret this section to read that “every person not expressly excluded by this Act or the law of England from giving evidence shall be competent and compellable to give evidence in any criminal proceedings.”

36.1.4 Section 193 of the **Criminal Procedure Act** provides that any question concerning the competence and compellability of witnesses shall be decided by the “court in which trial proceedings are conducted”. The issue of competence may involve questions of fact such as whether a witness can understand the nature of an oath.¹

36.1.5 At common law all witnesses must testify upon oath. This requirement is repeated by

¹ It is therefore a “trial within a trial” in much the same way as the issue of whether an alleged confession was voluntary. Other witnesses may be heard on the issue, and the proposed witness may himself be questioned by the judge and parties before being sworn.

section 162 of the **Criminal Procedure Act**² subject to two exceptions contained in sections 163 and 164 respectively.³

36.1.6 The two exceptions to the general rule are, first, that witnesses who for any reason object to taking an oath are permitted instead to make an affirmation,⁴ and secondly that a witness who does not understand the nature of an oath may be admonished to speak the truth and then give unsworn evidence.⁵ This provision is used principally for receiving the unsworn evidence of children but was also intended to be used by pagans and persons without the intellectual capacity to understand the nature of the oath.⁶ Sections 162, 163 and 164 read as follows:

162 Witness to be examined under oath

- (1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:

‘I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God’

- (2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

163 Affirmation in lieu of oath

- (1) Any person who is or may be required to take the oath and -
- (a) who objects to taking the oath;
 - (b) who objects to taking the oath in the prescribed form;
 - (c) who does not consider the oath in the prescribed form to be binding on his conscience; or
 - (d) who informs the presiding judge or, as the case may be, the presiding

² There is a similar provision in section 39(1) of the **Civil Proceedings Evidence Act** 1965.

³ Hoffmann & Zeffertt **The South African Law of Evidence** Fourth Edition Butterworths 1989 at p 440.

⁴ Section 163 of the **Criminal Procedure Act** 1977.

⁵ Section 164 of the **Criminal Procedure Act** 1977.

⁶ Hoffmann & Zeffertt at p 441.

judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief, shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding officer or, in the case of a superior court, the presiding judge or the registrar of the court:

‘I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth’.

- (2) Such affirmation shall have the same legal force and effect as if the person making it has taken the oath.
- (3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

164 When unsworn or unaffirmed evidence admissible

- (1) Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth.
- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.

36.1.7 If the provisions of sections 163 and 164 do not apply, it is necessary to apply section 162(1). The consequence of a witness not taking an oath, making an affirmation or being admonished is that what the witness “says has neither the character nor the status of evidence”.⁷

36.1.8 Young children are competent witnesses if, in the opinion of the court, they can understand what it means to tell the truth. They may give their evidence either sworn or unsworn, depending upon whether in the opinion of the court they can understand the nature and religious sanction of an oath.⁸ There is no particular age over which children are competent to give evidence upon oath. Even very young children may testify provided that they appreciate the duty to speak the truth; have

⁷ **S v Kahn** 1979 (1) SA 583 (N) as quoted in Hoffmann & Zeffertt at p 442.

⁸ Hoffmann & Zeffertt at p 375.

sufficient intelligence; and can communicate effectively.⁹ The usual procedure is for the judge or magistrate to question the child, but counsel may also put questions if they wish. In terms of section 164 of the **Criminal Procedure Act** children may give unsworn evidence. However, in such a case the presiding officer is obliged to admonish the witness to speak the truth.

36.1.9 The vital inquiry in terms of the law as it now stands is whether a child is competent enough to give evidence. If the judge is not satisfied that a child understands the nature of an oath, he or she must proceed to inquire whether he or she is competent to give unsworn evidence. There is no fixed age at which children become competent witnesses. In each case the judge or magistrate must satisfy himself or herself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the consequences and “badness” of lying, he or she cannot be admonished to tell the truth - and is an incompetent witness. Other witnesses may give evidence of the child’s mental capacity and both they and the child may be questioned by the parties.¹⁰

36.1.10 In the judgement **S v N**¹¹ the court held that the phrase ‘subject to the provisions of sections 163 and 164’ in section 162(1) of the **Criminal Procedure Act** means that section 162(1) is subordinate to sections 163 and 164 in the event that the circumstances contained in those sections have been shown to exist. The court held further that the court should, before administering the oath to a child or any person lacking in formal education or for any other reason might not have the required capacity, enquire whether such a witness understands the meaning of and possesses the capacity to appreciate and accept the religious sanction of the oath. If, after such an enquiry, the court finds that the witness does not possess the required capacity, it should establish whether he or she understands what it means to speak the truth as, in the absence of the capacity to distinguish between the truth and falsity, he or she is not a competent witness. The capacity to distinguish between the truth and falsity is furthermore a prerequisite for the making of an affirmation or an admonition in terms of sections 163 and 164 of the Act.

⁹ Schwikkard, Skeen and van der Merwe **Principles of Evidence** at p281.

¹⁰ See Chapter 33 above.

¹¹ 1996 (2) SACR 225.

- 36.1.11 The provisions of section 162(1) of the Act, do not therefore apply if -
- (1) the grounds of objection enumerated in subsections (1)(a) to (d) of section 163 of the Act are invoked, in which event the witness must make an affirmation in the terms prescribed, or
 - (2) if it is found that the person who is intended to be called as a witness does not understand the nature and import of the oath or the affirmation, in which event such a person must be admonished to speak the truth.¹²

36.1.12 The gravity of the consequences of not complying with the provisions contained in sections 162, 163 or 164 are clearly illustrated in the following two cases. In **S v N**¹³ the magistrate, in convicting the accused, relied on the evidence of the complainant (a ten year-old child alleging indecent assault). On appeal the court found that the oath had not been properly taken (from the questions asked of the witness it did not appear that she understood the meaning and religious sanction of the oath), and that as the magistrate had decided to place the child under oath, no affirmation or admonition to speak the truth had transpired either. Despite the fact that the complainant was able to understand the questions put to her and was able to give answers that the court could understand, the Appeal Court found that this resulted in a failure of justice of such a magnitude as to exclude the evidence of the complainant, thereby resulting in the conviction and sentence being set aside.

36.1.13 In the same vein the court found in **S v V**¹⁴ that the capacity to understand the difference between truth and falsehood is thus a prerequisite for the oath, the affirmation and an admonition in terms of section 164. If section 164 is to be resorted to in order to procure the evidence of a child the court must first make the necessary finding that the child does not understand the nature and import of the oath. To make a finding entails an enquiry. The court must enquire and satisfy itself whether the child understands the oath and understands what it means to speak the truth. If the child does not, he or she cannot be admonished under section 164, and is an incompetent witness whose evidence is inadmissible. On appeal it was found that the

¹² Ibid at 228.

¹³ Ibid.

¹⁴ 1998 (2) SACR 651 (C).

questioning of the complainant (a four-year-old) and her answers in the enquiry into her comprehension of the truth, was altogether inadequate to satisfy any court that she had a real understanding of what it is to testify truthfully.¹⁵ Despite this, the magistrate allowed her to testify without her being admonished to tell the truth. The trial court relied upon the complainant's evidence to the irremediable prejudice of the accused so that the irregularity in the proceedings in fact resulted in a failure of justice. The proceedings, convictions and sentence were set aside.

36.1.14 As is illustrated in the above cases the competence requirement currently often acts as an exclusionary mechanism. The witness's competence to testify is restricted, almost clinically, to the provisions contained in sections 162, 163 and 164. Never is the witness's ability to understand the questions put to him or her or his or her ability to give understandable answers to the court in response to those questions assessed. The witnesses mostly affected by this exclusion have often, because of their inherent vulnerabilities, such as youth or lack of mental ability, been targeted as victims of sexual offences due to the knowledge on the part of the perpetrator that such victims may not meet the threshold of being found to be competent to testify.

36.2 Comparative analysis

36.2.1 In the United Kingdom Chapter five of part 2 of the **Youth Justice and Criminal Evidence Act** 1999 provides that witnesses are competent to give evidence in court if they can understand the questions put to them and give answers that the court can understand. The Act allows competent adult witnesses to give evidence unsworn if necessary.¹⁶ In an explanatory document¹⁷ the Home Office explains the motivation for changing the rules relating to competence as follows:

It is important that whenever possible, witnesses' evidence is heard. Adults with physical or learning disabilities may well be able to understand questions put to them, and give intelligible answers, although they may need help to ensure that their answers are understood.

¹⁵ Ibid at 655.

¹⁶ [Http://www.homeoffice.gov.uk/yjceact/crimevint.htm](http://www.homeoffice.gov.uk/yjceact/crimevint.htm) at 00/02/22

¹⁷ [Http://www.homeoffice.gov.uk/yjceact/qandapt2.htm](http://www.homeoffice.gov.uk/yjceact/qandapt2.htm) at 00/02/22.

36.2.2 Prior to the amendment of the competency rules in the United Kingdom, adult witnesses, those over the age of 14, could only give evidence under oath or affirmation. Certain adults with learning difficulties, for example, who were capable of giving evidence in court due to the fact that they could understand the questions put to them and give intelligible answers in return, were prevented from giving evidence if they could not demonstrate that they understood the nature of the oath and the special significance of telling the truth under oath in court. The amendment now enables such witnesses to give unsworn evidence. The magistrate or jury (if there is one) will now decide what weight should be placed on their evidence.

36.2.3 The relevant sections¹⁸ of the **Youth Justice and Criminal Evidence Act** read as follows:

Chapter V Competence of Witnesses and capacity to be sworn

Competence of witnesses

53. (1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.
- (2) Subsection (1) has effect subject to subsections (3) and (4).
- (3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to -
- (a) understand questions put to him as a witness, and
 - (b) give answers to them which can be understood.
- (4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).
- (5) In subsection (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).

Determining competence of witnesses

- 54 (1) Any question whether a witness in criminal proceedings is competent to give evidence in the proceedings, whether raised -
- (a) by a party to the proceedings, or
 - (a) by the court of its own motion,
- shall be determined by the court in accordance with this section.
- (2) It is for the party calling the witness to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings.
- (3) In determining the question mentioned in subsection (1) the court shall treat the

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[Http://www.hmso.gov.uk/acts/acts1999/90023-f.htm](http://www.hmso.gov.uk/acts/acts1999/90023-f.htm) at 00/05/17.

witness as having the benefit of any directions under section 19 which the court has given, or proposes to give, in relation to the witness.

- (4) Any proceedings held for the determination of the question shall take place in the absence of the jury (if there is one).
- (5) Expert evidence may be received on the question.
- (6) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties.

36.2.4 In New Zealand¹⁹ the existing general rule is that anyone who has relevant evidence to offer is “competent” (or eligible) to give evidence. Traditionally, however, the evidence of some groups of witnesses has been considered untrustworthy. As a result, rules about competence and how to test the competence of various witnesses have been developed at common law. It appears that competence is currently tested only by an inquiry into whether the witness understands what truth is and what a promise means, which is followed by a promise to tell the truth. There seems to be no requirement, as a matter of practice, that a witness explain the difference between truth or lies; for instance, by giving a definition of truth. The operation of these rules has led to the exclusion of relevant testimony.

36.2.5 The New Zealand Law Commission voices the concern that the competence requirement operates as an exclusionary rule.²⁰ In Preliminary Paper 26 **The Evidence of Children and Other Vulnerable Witnesses** the New Zealand Law Commission discusses the law of competence, especially as it relates to children and people with intellectual disabilities. It also questions whether the law is operating effectively and poses options for reform.

36.2.6 In referring to the Canadian and United Kingdom position,²¹ the New Zealand Commission found that it seems to be generally acknowledged that a judge cannot appropriately assess whether a witness has sufficient intelligence to give a rational account of past events. On these points the New Zealand Court of Appeal held as follows in **R v Accused**:²²

¹⁹ New Zealand Law Commission Preliminary Paper 26 **The Evidence of Children and Other Vulnerable Witnesses** Wellington: New Zealand 1996.

²⁰ Ibid.

²¹ Ontario Law Reform Commission **Report on Child Witnesses** OLRC Toronto 1991, and the **Report of the Advisory Group on Video Evidence** Home Office, London 1989.

²² [1991] 2 NZLR 649.

We are of the view that here in New Zealand where a child's evidence has always been received without the formality of oath-taking, but on a promise to tell the truth once it is established such a child has sufficient appreciation of the solemnity of the occasion . . . We think this practice is in accord with experience, and current opinion of professional educators and child psychologists . . .

Counsel argued that the Judge's questions were leading and that he did not test the respective children's powers of comprehension by seeking from them definitions of promise, truth, lies, etc. We think there is no substance at all to those complaints. People of all ages use words correctly to convey meaning in ordinary speech but at the time if pressed sometimes cannot give very precise, or even adequate, linguistic definitions. We think these criticisms overlook that the questions are preliminary tests of capacity and competence before the substantive evidence of a child witness is embarked upon. It would be a damaging misjudgment in balance if a child witness were subjected to an emphatic test of general cognitive skills in the preliminary questioning on competence . . . [W]e do not think it is wise for the Judge at this stage to embark upon a lengthy interrogation seeking definition of words or concepts. There are safeguards. If the evidence appears as it unfolds to be unsatisfactory then the Judge, depending on other evidence in the trial, has statutory powers . . . We think that a jury should be told that a child is not disqualified simply by reason of age alone and that there is no precise age which determines a child's competency. This depends on the child's capacity and intelligence, or understanding of the difference between truth and falsehood and on appreciation of the duty to tell the truth. As with all witnesses the jury are the sole judges of the credibility of a child who gives evidence.

These comments from the Court of Appeal acknowledge contemporary research concerning the psycho-social capacity of young children, and support the view that the fact-finder is best placed to make decisions concerning weight and credibility.

36.2.7 The New Zealand Law Commission posed the question as to whether appreciating the duty to tell the truth and promising to do so, as part of the competence test, can accurately predict whether the witness will give honest evidence. The Commission found that no such prediction could be made. It found that it is clear that not everyone who takes an oath or affirmation tells the truth, even when aware that lying on oath is an offence. Understanding the importance of telling the truth cannot guarantee that the truth will be told. Conversely, it found that it does not follow that failing to make a promise, or failing to adequately articulate the nature of a promise, will result in the witness lying. The Commission refers to a study in Canada where it was found that there is no correlation between understanding the meaning of the oath and speaking the truth in court.²³ The New Zealand Law Commission concludes that excluding the relevant evidence of a witness under

²³

Ontario Law Reform Commission **Report on Child Witnesses** OLRC Toronto 1991 at pp 37.

this limb of the competence requirement seems to run counter to the goal of bringing all relevant evidence before the court and ignores the ability of fact-finders to make decisions about weight and credibility, which they do constantly with regard to those who are presumed competent. It is therefore unclear why extracting a promise to tell the truth is so important. The only motivation in favour of requiring an oath or affirmation is that some witnesses may feel psychologically obliged to tell the truth or may attach symbolic importance to making an oath or affirmation and would therefore be more likely to tell the truth.

36.2.8 The New Zealand Law Commission concludes its discussion of the competency rule by finding that the competency requirement should be abolished. This conclusion is motivated by the Commissions' finding that abolishing the competency requirement would ensure consistency with the purpose of the law of evidence; an increased amount of relevant evidence would be made available to fact-finders for their assessment of reliability and weight; and that no person (child or adult) would be required to be tested for competence in order to give evidence, thereby relieving the judge of the duty to test the competence of any prospective witness.²⁴ The result would be that all witnesses would be able to testify, subject only to the general provisions concerning admissibility.

36.2.9 The New Zealand Commission reached this decision after weighing up the findings of numerous other jurisdictions. This approach has been recommended in several reports, namely "A Public or Private Nightmare?"²⁵ (the "Geddis Report"), by the Canadian Committee on Sexual Offences Against Children and Youths, (the "Badgley Report"),²⁶ by the Law Reform Commission of Canada,²⁷ the Ontario Law Reform Commission,²⁸ as well as by commentators, including

²⁴ New Zealand Law Commission Preliminary Paper 26 **The Evidence of Children and Other Vulnerable Witnesses** Wellington: New Zealand 1996 at pp 13.

²⁵ Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, Wellington, 1988

²⁶ **Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths** (Ottawa, 1984) (the "Badgley Report").

²⁷ Law Reform Commission of Canada, **Report on Evidence** (Ottawa, 1975).

²⁸ **Report on Child Witnesses**.

Wigmore,²⁹ McCormick,³⁰ and Paciocco,³¹ and has been implemented in some states in the United States and in Rule 601 of the Federal Rules of Evidence and in the United Kingdom.³²

36.2.10 For the sake of brevity only the findings pertinent to the point in issue in the aforementioned reports are quoted below:

The Badgley Report recommends -

(1) Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of inadmissibility.

(2) A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying.

The Advisory Committee on the Federal Rules of Evidence has stated (in relation to the general rule of competency):

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application . . . A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility.

The Law Reform Commission of Canada recommends the elimination of the common law grounds rendering a person incompetent to testify at trial arguing -

Because of the impossibility of stating and applying a standard of mental inconsistency that renders a witness incompetent to testify, it seems preferable simply to let the trier of fact take into account any such incapacity in assessing the weight to be given to the testimony.

²⁹ **Wigmore on Evidence** Vol 2 Little Brown: Boston 1940 at para 509 as quoted infra.

³⁰ **McCormick on Evidence** West Publishing Co: St Pauls 1972 at para 72 as quoted infra.

³¹ Paciocco 'The Evidence of Children: Testing the Rules Against what we know' (1996) **Queens LJ** 345 at 393.

³² Section 33A of the Criminal Justice Act 1988, as amended in 1991, provides that children under the age of 14 years must give unsworn evidence and removes any special inquiry into the competence of children. These changes implemented the recommendations of the Pigot Report. See **Halsbury's Statutes** Vol 17 4ed at 255.

The Ontario Law Reform Commission takes the position that -

[N]o special competency examinations should be required of child witnesses. Providing the child promises to tell the truth . . . the child ought to be permitted to give evidence.

The Geddis Report concludes -

It is our view that the competency test serves no useful function and should be abandoned. The weight to place on the child's testimony would be determined by the trier of fact.

36.2.11 The New Zealand Law Commission acknowledges that problems may arise with the evidence of some witnesses, due to difficulties with communication and accurate perception and recall. However, the Commission recommends that where difficulties do exist, they may be more appropriately addressed by ensuring that procedures for giving evidence enhance reliability and effective communication, rather than simply excluding the evidence.

36.2.12 The New Zealand Commission opts to retain the requirement to swear an oath or take an affirmation and where it is necessary still, finds it desirable that a child should make a declaration or promise to tell the truth, even if there is no competence requirement. This means that there will normally be no inquiry into whether a child or any other witness understands the nature of the promise. It will remain open to the judge to make a preliminary inquiry where it seems likely that a witness may not understand the nature of a promise. The Commission refers to two options in this regard without any detailed discussion on the point. Firstly, even where the witness does not understand the promise to tell the truth, the witnesses's evidence could still be admissible and the requirement to promise to tell the truth waived. Secondly, the United Kingdom approach could be followed whereby it is required that all children give "unsworn" evidence, that is, without taking an oath or making a promise to tell the truth. This would have no effect on the validity of the evidence.³³ Such an approach removes any need to inquire into the child's understanding of a promise and therefore abolishes the competence requirement as it relates to young children.

36.2.13 A number of other countries have recently revised their competence tests. In

³³ That is, there is no effective legal distinction between sworn and unsworn evidence (section 33A of the Criminal Justice Act 1988 (UK), as amended in 1991).

Ireland's **Criminal Evidence Act** 1992, sections 27(1) and 27(3) provides, in relation to both children and people with "mental handicap", that -

Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that the person is capable of giving an intelligible account of events which are relevant to those proceedings.

The presiding officer therefore focuses on communication abilities rather than testing intellectual development. The determining factor is the witnesses' ability to communicate effectively on matters which are relevant to the proceedings.

36.2.14 Section 701 of the **California Evidence Code** provides as follows:

- (a) A person is disqualified to be a witness if he or she is:
 - (1) Incapable of expressing herself or himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him [or her] . . .

36.2.15 To similar effect, section 13(4) of the Australian **Evidence Act** 1995 (Commonwealth consolidated Act) provides:

- A person is not competent to give evidence about a fact if:
- (a) the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact; and
 - (b) that incapacity cannot be overcome.

Section 13(3) provides that such person may still be competent to give evidence about other facts. Section 13 of this Act, in its entirety, addresses competence in relation to lack of capacity. It reads³⁴ as follows:

Competence: lack of capacity

- (1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.
- (2) A person who because of subsection (1) is not competent to give sworn evidence is competent to give unsworn evidence if:
 - (a) the court is satisfied that the person understands the difference between the truth

³⁴

[Http://www.austlii.edu.au/au/legis/cth/consol_act/ea199580/s13.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ea199580/s13.html).

- and a lie; and
 - (b) the court tells the person that it is important to tell the truth; and
 - (c) the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.
- (3) A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact, but may be competent to give evidence about other facts.
- (4) A person is not competent to give evidence about a fact if:
- (a) the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact; and
 - (b) that incapacity cannot be overcome.
- (5) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
- (6) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.
- (7) For the purposes of determining a question arising under this section, the court may inform itself as it thinks fit.

36.2.16 Similarly, section 9(1) of the Queensland (Australia) **Evidence Act** 1977 provides as follows for evidence to be given by children:

Evidence of children

- 9.(1)** Where in any proceeding a child called as a witness does not in the opinion of the court understand the nature of an oath, the court -
- (a) shall explain to the child the duty of speaking the truth; and
 - (b) whether or not the child understands that duty, shall receive the evidence of the child though not given on oath unless satisfied that the child does not have sufficient intelligence to give reliable evidence.
- (2) A person charged with an offence may be convicted upon evidence admitted by virtue of this section.
- (3) The fact that the evidence of a child in any proceeding is not given on oath shall not of itself diminish the probative value of the evidence.
- (4) A child whose evidence has been received by virtue of this section is liable to be convicted of perjury in all respects as if the child had given the evidence upon oath.
- (5) The evidence of a child, though not given upon oath, but otherwise taken and reduced into writing as a deposition, shall be deemed to be a deposition to all intents and purposes.

Expert evidence of ability of child under 12 years to give reliable evidence

9A. Where in any proceeding -

- (a) a court is determining whether a child under the age of 12 years has sufficient intelligence to give reliable evidence; or
 - (b) the evidence of a child under the age of 12 years is admitted;
- expert evidence is admissible relating to the level of intelligence of the child including the child's powers of perception, memory and expression or relating to any other matter relevant to the child's ability to give reliable evidence.

36.2.17 Section 106B of the Western Australia Consolidated Acts **Evidence Act 1906**³⁵ provides for the sworn evidence of children. In 1992 this Act (No. 36 of 1992) was amended to make provision for the following:

Sworn evidence of children

106B. (1) A child who is under the age of 12 years may in any proceeding, if the child is competent under subsection (2), give evidence on oath under section 97(3) or after making a solemn affirmation under section 97(4).

(2) A child who is under the age of 12 years is competent to take an oath or make a solemn affirmation if in the opinion of the Court or person acting judicially the child understands that

- (a) the giving of the evidence is a serious matter; and
- (b) he or she in giving evidence has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

36.3 Submissions

36.3.1 In dealing with the requirement of competency, the Issue Paper posed the question as to whether magistrates should receive specialised training to determine the competency of the child to testify. Respondents were also asked to comment on whether the application of section 164 of the Criminal Procedure Act, 1977, causes problems in practice.

36.3.2 **Adv J d'Oliviera**, responding in his capacity as the then Attorney-General of the Transvaal, submits as follows -

³⁵

[Http://www.austlii.edu.au/au/legis/wa/consol_act/ea190680/s106b.html](http://www.austlii.edu.au/au/legis/wa/consol_act/ea190680/s106b.html).

Regrettably, in many instances small or mentally handicapped children are found by magistrates to be incompetent witnesses and are not allowed to testify. This finding is made after having asked the child, and only the child, a few questions. In most instances, care-givers are able to say that the child does know what speaking the truth entails and is able to give an accurate account, even if by using gestures and the like.

A full investigation where all relevant evidence may be taken into account, might assist in over-coming this obstacle. However, it is firmly believed that legislation allowing all children to testify, is called for. During this process (of testifying) the child's ability to testify and to speak the truth can be assessed *ex post facto* from the totality of the evidence given, taking into account also, if necessary, the evidence of care-givers and or experts.

He attaches an example reflecting the absurdity of the questioning which is used to determine whether a child is competent to testify. In the unreported matter of **S v C M Van der Westhuizen**³⁶ the presiding officer decided that a two-year-old child, testifying through an intermediary, was not competent to testify after she was *inter alia* asked whether she knew her date of birth, whether she knew which year it was and whether she knew what it was to tell a lie.

36.3.3 Most of the respondents³⁷ are in agreement that magistrates should receive specialised training to deal with children in general and not just specifically related to determining the competency of the complainant. One respondent suggests that magistrates should do a course similar to Systematic Training in Parenting (STEP) or Parent Effectiveness Training (PET).³⁸ Although some respondents³⁹ are in favour of training magistrates to determine whether a child is competent to testify, the majority of the respondents opine that only an expert can determine whether a child is competent to testify or not. **Tshwaranang Legal Advocacy Center** states that the decision as to whether a child is competent to testify should be made by a team of experts assigned to the case. **Ms Madonsela** opines that psychologists assigned to the courts should be

³⁶ Heard on the 8th May 1995.

³⁷ **R Blumrick, Office of the then Attorney General, Pietermaritzburg; WL Clark, Senior Public Prosecutor, Verulam; Thuli Madonsela, Department of Justice; ML Le Roux, Senior Public Prosecutor, Port Elizabeth; Sr Potter, Agape C.P. School; combined report by members of SAPS: Child Protection Units Kwazulu Natal; Tshwaranang Legal Advocacy Center; Collet Wagner, Chief Social Worker, Department of Welfare and Population Development; K Worrall-Clare; and Northern Cape Association for Persons with Physical Disabilities.**

³⁸ **P Jackson, Western Cape Street Child Forum.**

³⁹ **Collet Wagner, Chief Social Worker, Department of Welfare and Population Development; K Worrall-Clare; Northern Cape Association for Persons with Physical Disabilities.**

involved and in a combined report by members of **SAPS: Child Protection Units in KwaZulu Natal**, the submission is made that a standard competency test should be compiled according to age groups and that this should be done in conjunction with a psychologist.

36.3.4 In the only dissenting submission, **Ms Clark, Senior Public Prosecutor, Verulam**, initially agrees that it is a good idea to give magistrates specialised training in this regard, but then continues to state that -

However many Magistrates do in practice employ innovative thinking with good results. The decision as to whether the child is competent to testify or not seldom causes problems. Where it does create problems the child is almost invariably very young and the writer has felt that her (or his) testimony would probably not have been reliable anyway.

36.4 **Evaluation and recommendation**

36.4.1 Much sexual abuse of children and adults living with various disabilities (physical and mental) goes unpunished in South Africa as a result of a person, usually the complainant, being found to be an incompetent witness. Frequently a decision is reached in this regard on the basis that the person does not understand the oath or, when questioned, is not able to explain the difference between telling the truth and a lie. This decision is made despite the fact that the person may quite accurately be able to tell the court what happened to him or her and may be capable of understanding questions put to him or her and be able to answer these questions intelligibly and honestly. In effect the threshold which a potential witness has to meet in order to be found competent to testify often acts as an exclusionary measure.

36.4.2 It is unclear why the courts need to test whether a potential witness can understand the duty to tell the truth. It is trite that not everyone who takes the oath or affirmation tells the truth, and conversely, it does not follow that failing to make a promise, or failing to adequately articulate the nature of a promise, will result in a person lying. Excluding the often conclusive evidence of a witness as a result of not meeting the requirements contained in sections 162, 163 or 164 of the **Criminal Procedure Act** seems to run counter to the goal of bringing all relevant evidence before the court and ignores the ability of the presiding officer to make a decision about the weight and credibility to be accorded to such evidence.

36.4.3 From the comparative analysis above and the submissions received it is clear that a presiding officer is not well placed to make an assessment of a witness's cognitive ability. A similar conclusion was reached in the chapters dealing with the cautionary rules. Conclusions regarding the testimony of witnesses who were either victims of a sexual offence, were single witnesses, children or, in the worst case scenario, all three, based on erroneous assumptions were until recently the order of the day. Many victims of sexual offences are still denied justice as a result. The emphasis which is placed on making the witness aware of the importance of telling the truth and the gravity attached to him or her lying seems to stem from an inherent fear that the witness may fabricate events or make up the evidence presented to court. If, for example, a child cannot display to the court that he or she grasps what it is to tell the truth and is admonished appropriately, his or her evidence is discarded. This is done without assessing whether the child can understandably relay the events which are in issue to the proceedings. Recent research has shown that the memory of children is as accurate as that of adults, that children do not lie more than adults, and that children can discern fact from fantasy particularly in the context of acts of abuse.⁴⁰ Similar justifications exist regarding the testimony of physically or mentally disabled persons.

36.4.4 The Commission is of the opinion that the option of training magistrates to aid them in determining whether a witness is competent to testify or not will be of limited value. Firstly one has to recognise that the presiding officer is just that, a presiding officer, and cannot be expected to be or be trained to be a psychologist or behavioural specialist. The role of experts in the field of child psychology, counselling of sexual offence victims and such like is crucial in many sexual offence matters and it is important to recognise the role they have to play.⁴¹ Training or sensitising of magistrates to this field would naturally be beneficial and would enhance the quality of the decisions made by presiding officers, but in the opinion of the Commission this is not the answer to the problem presented in this chapter. Even with training the presiding officer would still be forced to find a witness incompetent to testify if such witness did not measure up to the requirements of sections 162,163 or 164 of the **Criminal Procedure Act**.

⁴⁰ See paragraph 12.3.4.3 above.

⁴¹ See also chapter 33 dealing with experts.

36.4.5 The Commission recommends that a witness should not be disqualified from testifying due to the fact that he or she is unable to define the difference between telling the truth and a lie. Instead it is submitted that all witnesses should be regarded as competent to testify if they can understand the questions put to them and can in return give answers that the court can understand. If any doubt exists as to whether the witness is capable of communicating with the court an expert assessment should be called for.⁴² Such a witness will then give unsworn evidence. If the evidence appears as it unfolds to be unsatisfactory, then the presiding officer, depending on the other evidence presented at trial, can exercise the statutory powers vested in him or her to exclude such evidence on the grounds that such evidence is not relevant. It will be for the presiding officer to decide what weight should be placed on such a witness's evidence. Despite the above recommendations and in recognition of the solemnity and seriousness of the proceedings the Commission still believes that a witness should be enjoined to tell the truth.

36.4.6 Training of court officials will be essential in order to give effect to these recommendations.

36.4.7 The Commission therefore recommends that section 164(1) of the Criminal Procedure Act be amended as follows:

164 When unsworn or unaffirmed evidence admissible

- (1) Any person who, from ignorance arising from youth, defective education or other cause, **[is found not to understand the nature and import of the oath or the affirmation,]** may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible; and provided further that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth**[, the whole truth and nothing but the truth]**.

Amended this subsection will read as follows:

⁴² A witness referring to winter as the time when the leaves are brown or using his or her own terms to describe events is still capable of communicating with the court. The use of special measures will make the witnesses testimony accessible to the court.

164 When unsworn or unaffirmed evidence admissible

- (1) Any person who, from ignorance arising from youth, defective education or other cause, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person is able to understand questions put to him or her and to respond to such questions in a manner which is intelligible; and provided further that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

36.4.8 The Commission further recommends that a new section be inserted in the Sexual Offence Act clearly establishing that any child in a sexual offence trial is competent to testify. This section should read as follows:

- (1) No child below the age of 18 years, other than a child who for any reason does not have the capacity, verbal or otherwise, to respond to simple questions, shall be precluded from giving evidence in court in criminal proceedings involving the alleged commission of a sexual offence.
- (2) The evidence given by a child referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.

CORROBORATION⁴³ OF UNSWORN⁴⁴ EVIDENCE**36.5.1 The South African legal position**

36.5.1.1 There is no statutory requirement in our law that a child's or any other witness's

⁴³ Corroboration is not a technical term. It is evidence which confirms or supports a fact of which other evidence is given. See **S v B** 1976 (2) SA 54 (C) at 59. Evidence which is merely consistent with facts which are not in dispute cannot be described as corroboration: corroborative evidence must have a bearing on facts which are in dispute. See **R v P** 1957 (3) SA 444 (A) at 454. See also generally Savage 'What is corroboration?' (1963) 6 **Criminal Law Quarterly** 159.

⁴⁴ I.e. evidence not given on oath or affirmation. See, in general, sections 162 (witness to be examined under oath), 163 (affirmation in lieu of oath), and 164 (when unsworn or unaffirmed evidence admissible) of the Criminal Procedure Act 51 of 1977.

evidence must be corroborated.⁴⁵ Nor have the courts insisted upon a 'rigid rule that corroboration should always be present before a child's evidence is accepted.'⁴⁶ However, it has been accepted that the evidence of young children should be treated with great caution owing to the dangers inherent in such evidence.⁴⁷ The imaginativeness and suggestibility of children are only two of the elements against which a trier of fact should guard, and a trial court is required to indicate in the reasons furnished for its decision that it has fully appreciated these dangers and duly taken account of such safeguards as there may be in the circumstances of the case. The primary concern of a trier of fact is to ascertain whether the evidence of a child witness is trustworthy.

Where the nature of the evidence given by a child is of a simple kind, related to a subject matter falling clearly within the field of his understanding and interest, and the circumstances are such as practically to exclude the risk arising from suggestibility, then clearly there may be sufficient indicia of trustworthiness to dispense with corroboration. ... Where, on the other hand, the circumstances are somewhat complex, giving ample scope for suggestion and imagination, the courts are inclined to insist on corroboration of the child's evidence ...⁴⁸

36.5.1.2 It stands to reason that whenever corroboration is present, it would be easier to conclude that the required standard of proof has been satisfied. It is therefore understandable that the trier of fact will always look for corroboration even though corroboration is not formally required by law.⁴⁹ This is the issue that needs to be addressed.

36.5.1.3 Corroboration should in principle emanate from a source independent of the witness who stands to be corroborated. Repetition of a story cannot furnish corroboration.⁵⁰ Repetition of a story can, at most, prove consistency - as is the case, for example, where a previous consistent

⁴⁵ Section 208 of the Criminal Procedure Act 51 of 1977 provides for conviction on the evidence of a single witness. Du Toit et al **Commentary on the Criminal Procedure Act** 24-6.

⁴⁶ **R v Manda** 1951 (3) SA 158 (A) at 163C.

⁴⁷ **R v Manda** 1951 (3) SA 158 (A) at 162. However, see also **S v S** (1995) 1 SACR 50 (ZS) especially at 54g - 60c.

⁴⁸ Du Toit et al **Commentary on the Criminal Procedure Act** 24-6.

⁴⁹ Schwikkard et al **Principles of Evidence** 372.

⁵⁰ This is otherwise known as the rule against self-corroboration.

statement of a witness is admitted in order to rebut an allegation of recent fabrication.⁵¹ However, proof of consistency is not the equivalent of corroboration.

36.5.2. Comparative law

36.5.2.1 Australia

36.5.2.1.1 In accordance with section 13⁵² of the **Evidence Act, 1995 (Commonwealth)** a person not competent to give 'sworn evidence'⁵³ may give unsworn evidence if -

- (a) the court is satisfied that the person understands the difference between the truth and a lie; and
- (b) the court tells the person that it is important to tell the truth; and
- (c) the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.⁵⁴

36.5.2.1.2 All other Australian jurisdictions also allow children to give unsworn evidence if they satisfy certain criteria. Queensland, for instance, restricts unsworn evidence to those children with 'sufficient intelligence to give reliable evidence'.⁵⁵ In the Northern Territory the evidence of children under the age of 14 years and being capable of giving an 'intelligent account' of their experience, can be received 'with the same consequences as if an oath had been administered in the ordinary manner'.⁵⁶ In New South Wales the child must be able to understand the difference between the truth and a lie or be able to respond 'rationally' to questions.⁵⁷

⁵¹ **S v Bergh** 1976 (4) SA 857 (A) at 869.

⁵² Also see 36.2.14 above.

⁵³ Evidence given on oath or affirmation is called 'sworn evidence'.

⁵⁴ Section 13(2) of the **Evidence Act, 1995 (Commonwealth)**.

⁵⁵ Section 9(1)(b) of the **Evidence Act, 1977 (Queensland)**.

⁵⁶ Section 25A(1)(b) of the **Oaths Act (Northern Territory)**.

⁵⁷ Section 32(3) of the **Oaths Act, 1900 (New South Wales)**.

36.5.2.1.3 Section 64 of the **Evidence Act, 1971 (ACT)** provides as follows:

64. Unsworn evidence of young children

- (1) Where the evidence of a child who has not attained the age of 14 years is required in a proceeding, the court may receive that evidence without administering an oath or requiring an affirmation or declaration and, subject to subsection (2), without any formality.
- (2) The court shall, before receiving evidence under subsection (1), explain, or cause it to be explained, to the child that he or she is required to tell truthfully what he or she knows about the matter to which the evidence relates.

36.5.2.1.4 Some of the Australian jurisdictions place age limits on the children who may give unsworn evidence. In Victoria and the Northern Territory the age limit is 14 years, in New South Wales, South Australia and Western Australia the limit is 12 years and in Tasmania the child must be of ‘tender years’ before they will be allowed to give unsworn evidence. Queensland does not place an age limit on the children who may give unsworn evidence.⁵⁸

36.5.2.1.5 Previously in Western Australia and Tasmania a defendant could not be convicted on the unsworn evidence of a child unless the evidence was corroborated. This is no longer the case and now legislation in most states provides that the unsworn evidence of a child is to be treated in the same way as sworn evidence.⁵⁹ A provision expressly providing against corroboration of unsworn evidence has been introduced in the Tasmanian Consolidated legislation **Evidence Act** of 1910. These provisions read as follows:

Sect 122C Unsworn evidence of child

A child under the age of 14 years who is not competent to give evidence under section 122 B may give evidence without taking an oath or making a solemn affirmation if the judge or person acting judicially is satisfied that the child can give an intelligible account of events which he or she has observed or experienced.

⁵⁸ Community Law Reform Committee of the Australian Capital Territory **Discussion Paper No. 4: Sexual Assault** (1997) par 526.

⁵⁹ Section 9(3) of the Evidence Act, 1977 (Queensland); section 12A of the Evidence Act, 1929 (South Australia); section 25A of the Oaths Act (Northern Territory); section 76F of the Evidence Act, 1971 (ACT); section 122D of the Evidence Act, 1910 (Tasmania); section 106D of the Evidence Act, 1906 (Western Australia).

Sect 122D Corroboration not required

(1) All rules of law or practice which provide that a person may not be convicted on the uncorroborated evidence of a child are abolished.

(2) A judge is not to warn a jury, or suggest to a jury in any way, that it is unsafe to convict a person of an offence on the uncorroborated evidence of a child because children are classified by the law as unreliable witnesses.

Similarly the **Evidence Act, 1995 (Commonwealth)** states that it is not necessary that evidence on which a party relies be corroborated.

36.5.2.1.6 As we have seen, the **Australian Capital Territory Evidence Act, 1971**⁶⁰ allows the court to receive the unsworn evidence of children under 14 years of age as long as the court explains to the child that he or she is required to tell truthfully what he or she knows about the matter to which the evidence relates. However, in 1985 the rule of practice requiring children's evidence to be corroborated in sexual offences cases was abolished by section 76F of the Evidence Act, 1971. Section 76F of the **Evidence Act, 1971 (ACT)** reads as follows:

76F. Abolition of rules about corroboration

- (1) Any rule of law or practice requiring the corroboration of evidence or requiring the judge to give a warning to the jury in criminal proceedings to the effect that it is unsafe to convict a person on uncorroborated evidence is abolished in so far as the rule applies to or in relation to evidence given by the complainant in the trial of a person for a prescribed sexual offence.
- (2) Nothing in this section shall affect the right of the judge in prescribed sexual offence proceedings to comment on any evidence that may be unreliable but the judge shall not, in such proceedings, give a warning to the jury to the effect that it is unsafe to convict the accused person on the uncorroborated evidence of the complainant.
- (3) Nothing in this section affects the operation of any rule of law or practice which requires-
 - (a) a judge, on the trial of a person for a sexual offence alleged to have been committed before 28 November 1985, to give the jury a warning as referred to in subsection (1); or
 - (b) a judge, on the trial of any person, to give the jury a warning to the effect that it is unsafe to convict a person on the uncorroborated sworn evidence of a child.

⁶⁰

36.5.2.1.7 Thus, although the rule requiring corroboration of the evidence of children in sexual offence cases was abolished in the ACT, the rules requiring the judge to warn the jury that it is unsafe to convict a person on the uncorroborated evidence of a child were preserved.

36.5.2.1.8 The Australian example also shows that where it is necessary to give corroboration warnings in cases where the only evidence is that of the child victim, the need for corroboration of evidence assumes a far greater role in order to secure a successful conviction. However, it is particularly difficult to obtain corroborative evidence where the sexual offence concerns a child victim. Rarely is there anyone present at the time the offence is committed other than the accused person and the child. Observable injury or distress is not always evident and delay in the child complaining is common - with the result that medical evidence implicating the accused person is often non-existent.

36.5.2.1.9 Research undertaken in Victoria (Australia) and in Western Australia supports the conclusion that the lack of corroborative evidence in cases where the victim is a young child results in many cases not proceeding to prosecution. It would be fair to suggest that this is also the case in South Africa. It is argued that this could lead to perpetrators of child sexual abuse concluding that their actions are beyond the reach of the law.

36.5.2.1.10 After reviewing research on the issue, the Law Reform Commission of Victoria concluded as follows:⁶¹

Research does not support the presumption that children are both so inherently unreliable, and so adept at giving untrue evidence, that the procedures and rules for adult witnesses provide inadequate safeguards.

36.5.2.1.11 The Law Reform Commission of Victoria accordingly recommended that the corroboration warning rule be abolished.⁶² The Victorian law has since been amended to the effect that a judge must not warn, or suggest in any way to, the jury that the law regards children as an

⁶¹ Law Reform Commission of Victoria **Report No. 18: Sexual offences against children**, par 2.

⁶² **Report No. 18**, para 236 - 242 and Recommendation 33(b).

unreliable class of witness. The judge is not prevented, however, from making any comment on evidence given in the proceeding that is appropriate to make in the interests of justice.

36.5.2.1.12 The Law Reform Commission of Western Australia has also considered the matter in some detail. The Law Reform Commission states:⁶³

The theory of unreliability of children's evidence has been based on a belief that, because of their immaturity, children have inferior powers of observation and recollection, are unable to comprehend or describe accurately what they have seen or experienced, and have no ethical sense or moral responsibility.

36.5.2.1.13 The Law Reform Commission cites examples of current research that indicates that children's evidence is not inherently unreliable. It also summarises the findings of empirical studies as follows:

- * there is no correlation between age and honesty and children are not more likely than adults to lie in Court;
- * children's powers of observation and recall in the short term are not inferior to those of adults, though they may recall different things and their memory may perhaps fade faster;
- * the immature tendency to mix fact and fantasy does not apply to children older than about the age of six;
- * the form of adult abuse is not likely to be a theme of childish fantasy.

36.5.2.1.14 At the time of the above Commission's investigation the Western Australia Consolidated Acts **Evidence Act** 1906⁶⁴ provided for the sworn evidence of children. In 1992 this Act (No. 36 of 1992) was amended to make provision for the non corroboration of unsworn evidence of children. These provisions read as follows:

Unsworn evidence of children

⁶³ **Report on the Evidence of Children and Other Vulnerable Witnesses** (Project No. 87) April 1991, p. 24.

⁶⁴ [Http://www.austlii.edu.au/au/legis/wa/consol_act/ea190680/s106b.html](http://www.austlii.edu.au/au/legis/wa/consol_act/ea190680/s106b.html).

106C. A child under the age of 12 years who is not competent to give evidence under section 106B may give evidence without taking any oath or making a solemn affirmation if the Court or person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events which he or she has observed or experienced.

Particular form of corroboration warning not to be given

106D. In any proceeding on indictment for an offence in which evidence is given by a child, the judge is not to warn the jury, or suggest to the jury in any way, that it is unsafe to convict on the uncorroborated evidence of that child because children are classified by law as unreliable witnesses.

36.5.2.1.15 In **Longman v. R**, Justice Deane averted to the difficulty of obtaining corroborative evidence when the offence is committed within a family context. He said:⁶⁵

Particularly in cases of sexual assault within a family unit where there are likely to be powerful influences favouring concealment rather than complaint, neither wisdom nor experience - be it judicial or otherwise - justifies the unqualified proposition that, in any case where the evidence of the complainant is uncorroborated about any element of the offence, it would be dangerous to convict on that uncorroborated evidence. In fact the circumstances of the particular case may be such that it is not dangerous to convict on such uncorroborated evidence at all.

36.5.2.2 **New Zealand**

36.5.2.2.1 New Zealand has addressed the issue by inserting section 23AB of the **Evidence Act, 1908**.⁶⁶ This section provides that where a person is tried for a sexual offence, no corroboration of the complainant's evidence shall be necessary for that person to be convicted. In addition, the judge shall not be required to give any warning to the jury relating to the absence of corroboration.⁶⁷ The provision reads as follows:

⁶⁵ **Longman v R** 89 ALR 161 at 171.

⁶⁶ By the **Evidence Amendment Act (No. 2)** of 1985. The section commenced operation on 12 January 1986.

⁶⁷ See also the Report of the New Zealand Law Reform Commission **Report 55: Evidence (Evidence Code and Commentary) Volume 2**, August 1999, p. 240.

23AB. Corroboration in sexual cases — (1) Where any person is tried for an offence against any of sections 128 to 144 of the Crimes Act 1961 or for any other offence against the person of a sexual nature, no corroboration of the complaint's evidence shall be necessary for that person to be convicted; and in any such case the Judge shall not be required to give any warning to the jury relating to the absence of corroboration.

(2) If, in any such case, the Judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words shall be required.

36.5.2.3 **Canada and the United States of America**

36.5.2.3.1 The corroboration requirement in relation to children has been abolished in Canada and all American states.⁶⁸

36.5.2.4 **Uganda**

36.5.2.4.1 The Uganda Law Reform Commission⁶⁹ is of the view that the rules relating to corroboration of a child's evidence should not be too rigid. When a judge or magistrate determines that a child has the ability to give evidence, he or she should not be compelled to warn the assessors about convicting on the child's evidence. He or she should have the discretion to give the warning if he or she finds that after conducting the *voir dire*, the child has no ability to give evidence. The Commission therefore recommends that if a judge or magistrate conducts a *voir dire* and is satisfied that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, there should be no need for corroboration by some material evidence as required by the current law.

36.5.3 **Evaluation and recommendation**

36.5.3.1 Although the rule of corroboration of the unsworn evidence of a witness (including a child) is not a statutory requirement in South African law, it is so firmly entrenched in practice that legislative intervention is necessary. The application of the corroboration warning rule for child

⁶⁸ Bronwyn Naylor 'Dealing with child sexual assault: Recent developments' (1989) 29(4) **British Journal of Criminology** 395 - 407.

⁶⁹ Uganda Law Reform Commission **A Study Report on Rape, Defilement and Other Sexual Offences** Publication No.1 2000 at p 103.

victims generally makes successful prosecution a difficult task and its retention must be questioned. This aspect is dealt with above in our discussion on the competency of children to testify.

36.5.3.2 In addition, the practice of requiring children about to give evidence to explain abstract concepts such as truth and lies, in our opinion gives no valid indication of truthfulness or reliability as a witness. Indeed, even those who have no difficulty in explaining the concepts are not necessary truthful and reliable.

36.5.3.3 We recommend the inclusion of the following section in the new Sexual Offences Act:

Abolition of rules of corroboration

- (1) Any rule of law or practice requiring the corroboration of evidence or requiring the presiding officer in criminal proceedings to remind himself or herself that it is dangerous to convict a person on the uncorroborated evidence of a witness is abolished to the extent that such rule applies to or in relation to evidence given by the complainant in criminal proceedings involving the alleged commission of a sexual offence.**

- (2) Nothing in this section shall be construed as affecting the power of the presiding officer in criminal proceedings involving the alleged commission of a sexual offence to make observations regarding the unreliability of any evidence.**

CHAPTER 37**SIMILAR FACT EVIDENCE****37.1 Introduction and current position**

37.1.1 The uncodified rule of excluding similar fact or propensity evidence is a general rule of evidence. It is not a rule that operates only in cases involving allegations of sexual offences. However, the focus of this chapter is on the effect of this rule in such cases.

37.1.2 Schwikkard¹ describes similar facts as facts which are directed at showing that a party to the proceedings (usually the accused) has behaved on other occasions in the same way as he or she is alleged to have behaved in the circumstances presently being considered by the court. In broader terms, similar fact evidence is evidence of facts, character or disposition of the accused that does not involve direct evidence relating to the charge before the court. According to Schwikkard² similar fact evidence is generally inadmissible because it is irrelevant. Stated differently, evidence of this nature will only be received if it is, first, sufficiently relevant to warrant its reception and, second, if it has a relevance other than one based solely upon character.

37.1.3 The rule entails that the prosecution may not adduce evidence of improper conduct by the accused on other occasions if its only relevance is to show that the accused is of bad character and is, therefore, likely to have committed the offence. Similar fact evidence will be admissible if its probative force is sufficiently strong to warrant its exceptional reception despite any practical disadvantages and despite its potential to prejudice the accused.³

37.1.4 As a general rule, evidence is not admissible if it proves only that the accused has the

¹ Schwikkard et al **Principles of Evidence** Cape Town: Juta 1997 at p 63.

² Ibid.

³ Hoffmann & Zeffertt **The South African Law of Evidence** Fourth Edition Butterworths 1989 at p 55.

propensity or disposition to commit a crime or a particular crime.⁴ Despite the general rule, evidence of a person's propensity to commit a crime may nevertheless be admissible if the evidence possesses certain other qualities. Specifically, propensity or similar fact evidence will be admissible if it possesses a particular probative value or cogency to the extent that, if accepted, it is objectively improbable that it has an innocent explanation.⁵ Hoffmann & Zeffertt state that there are some cases where the accused's disposition was so highly relevant to an issue, that it would have been an affront to common sense and justice not to allow evidence of that disposition in the circumstances of that case.⁶

37.1.5 Sometimes, a person who is charged with a sexual offence may already have a conviction for a similar offence. Alternatively, a person may be the subject of similar allegations by more than one complainant or may have been acquitted of similar charges. In such circumstances, the court must determine whether evidence of the prior conviction or other allegations should be admitted into evidence as proof of the offence with which the accused is charged. If a number of complaints are made against the accused, the court must also determine whether those charges should be dealt with in one trial, or whether there should be separate trials for each charge.

37.1.6 The question of whether evidence of this type, i.e. similar fact evidence or propensity evidence should be admissible or not are significant in two respects:

•• **Corroboration of the complainants' evidence**

Evidence of convictions for similar offences, or of allegations of other similar conduct, if admitted, must inevitably strengthen the prosecution's case by bolstering the credibility of the complainant. Further, in some cases where the complainant is a child and is too young to give evidence, the admission of such evidence could, depending on the circumstances, constitute important circumstantial evidence tending to prove the guilt of the accused. For these reasons, the admission of this type of evidence is likely to be sought by the

⁴ [Http://www qlrc.qld.gov.au/wp53/ch19.htm](http://www qlrc.qld.gov.au/wp53/ch19.htm). As on 01/07/19.

⁵ [Http://www qlrc.qld.gov.au/wp53/ch19.htm](http://www qlrc.qld.gov.au/wp53/ch19.htm) as on 01/07/19. at p 3

⁶ Ibid.

prosecution and resisted by the defence.

•• **Multiple appearances in court**

If the complaints of a number of victims against one person are not heard in one trial, it will be necessary for the complainant in respect of one charge and a witness in respect of a second charge involving a different complainant to give evidence at both trials. This experience will inevitably cause repeat trauma. Furthermore, especially in relation to children, the more often a child is required to repeat his or her evidence, the greater the possibility of inconsistencies are, leading to the perception that the child is an unreliable witness.⁷

37.1.7 The aim of this chapter is to address the concern as to whether the rule of excluding similar fact evidence is being used to exclude highly probative evidence, thereby allowing perpetrators of sexual offences who have already been accused, acquitted or convicted of a sexual offence in similar circumstances not to have to contend with such evidence.

37.2 Comparative law

37.2.1 Queensland

37.2.1.1 In Queensland legislation provides that the possibility of collusion no longer of itself precludes what would otherwise constitute similar fact evidence from being admitted into evidence. It is for the jury to decide what weight, if any, to attribute to the evidence. Section 132 A of the **Evidence Act 1977 (Qld)** provides:

In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

37.2.1.2 Section 132A was inserted into the **Evidence Act 1997 (Qld)** by the **Criminal Law**

⁷ [Http://www qlrc.qld.gov.au/wp53/ch19.htm](http://www qlrc.qld.gov.au/wp53/ch19.htm) .

Amendment Act 1997 (Qld) following a recommendation in 1996 by the Criminal Code Advisory Working Group that the **Evidence Act** 1977 (Qld) should be amended to overcome the decision of the High Court of Australia in **Hoch v The Queen**⁸ insofar as that decision applies to the possibility of concoction by witnesses.

37.2.1.3 The Criminal Code Advisory Working Group found that when similar allegations are made by children who are siblings or friends, it is easy to allege that they have had an opportunity to collude in giving their accounts of events. However, as a result of the recent amendment to the **Evidence Act** 1977 (Qld), whether in fact there has been collusion will be a question for the jury. The mere possibility of collusion will now not prevent the similar fact evidence of one child from being admitted to prove the complaint made by another child.⁹

37.2.1.4 In his final report, **An Inquiry into Sexual Offences Involving Children and Related Matters**, Mr Des Sturgess QC, the then Director of Prosecutions, was critical of the similar fact rule:¹⁰

[M]any times it shuts out evidence of considerable probative value and denies to the prosecution the right to produce the only corroborative evidence available.

37.2.1.5 Sturgess recommended that the following special “similar fact” provisions apply in prosecutions for incest (or attempted incest) and for sexual offences involving children:

Similar fact evidence in incest

- (1) Subject to subsection (2) in the prosecution of a person for incest or attempted incest evidence of a similar fact involving the person with whom it is alleged the incest occurred or the attempt was made or some other person shall be admitted.
- (2) Nothing in subsection (1) shall affect the discretion of the court to exclude the evidence on the ground of unfair prejudice.

⁸ (1988) 165 CLR 292)

⁹ <http://www qlrc.qld.gov.au/wp53/ch19.htm> as on 01/07/19 at pp5.

¹⁰ Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at para 7.126 as quoted in <http://www qlrc.qld.gov.au/wp53/ch19.htm> at pp 7.

- (1) If it is alleged the person with whom the incest that is charged was committed or attempted was a child the court, when considering whether it should exercise its discretion to exclude the evidence, shall take into account -
 - (a) the age of the child and any difficulty the child has in appearing in court or giving full evidence;
 - (b) the requirement for or the desirability of corroboration of the prosecution case and whether there exists other evidence capable of amounting to corroboration; and
 - (c) whether the circumstances of the alleged offence are such it is impossible for the prosecution to produce other eye witnesses who are not children.

Similar fact evidence in sexual offences involving children

- (1) Subject to subsection (2) in the prosecution of a person for an offence of a sexual nature against a child evidence of a similar fact involving that child or some other person shall be admitted provided it tends to identify the person charged as a person who does not accept or disregards usual community standards with respect to the involvement of children in sexual activity.
- (2) Nothing in subsection (1) shall affect the discretion of the court to exclude the evidence on the ground of unfair prejudice.
- (3) The court, when considering whether it should exercise its discretion to exclude the evidence, shall take into account -
 - (a) the age of the child and any difficulty the child has in appearing in court or giving full evidence;
 - (b) the requirement for or the desirability of corroboration of the prosecution case and whether there exists other evidence capable of amounting to corroboration; and
 - (c) whether the circumstances of the alleged offence are such it is impossible for the prosecution to produce other eye witnesses who are not children.

37.2.1.6 However, neither recommendation has been adopted in legislation. On closer inspection the recommendation in relation to prosecutions for other sexual offences against children would seem to render admissible evidence that did not connect the accused with the commission of the offence, but simply identified the accused as the kind of person who might commit such an offence. In other words, prejudicial evidence without probative value.

37.2.2 United Kingdom

37.2.2.1 Whilst explaining the import of similar fact evidence in the United Kingdom, the

United Kingdom Law Commission states that the courts have been willing to relax controls on the admission of this kind of evidence where they have been satisfied that its relevance is sufficient to outweigh any prejudice that may be caused to the defendant's case.¹¹

37.2.2.2 In **Makin v A-G for New South Wales**¹² the Privy Council stated that similar fact evidence may be admissible if it is relevant to an issue before the fact-finder. It was suggested that such relevance be derived from the impact that the similar fact evidence has upon the question whether the acts alleged to constitute the offence charged were designed rather than accidental, or if it rebuts a defence otherwise open to the accused.¹³

37.2.2.3 In **Boardman**¹⁴ the House of Lords reconsidered the admissibility of similar fact evidence. It stated that if the evidence bore a striking or peculiar similarity to the facts of the offence charged, it may be of sufficient relevance to justify its admission.¹⁵ To be admissible the evidence had to have some relevance, other than showing the defendant's propensity to commit the type of crime charged, or crimes in general, and must have a strong degree of probative force.

37.2.2.4 The most recent House of Lords authority in this area is **DPP v P**,¹⁶ in which the "striking similarity" test used in **Boardman** was stated to be just one means by which the enhanced relevance required of similar fact evidence may be found. The current test can be simply stated: the probative value of the similar fact must be sufficiently great to justify its admission, notwithstanding its prejudicial effect. While striking similarity can provide this enhanced relevance, and may continue to be insisted upon where the identity of the perpetrator of an offence is in doubt, other factors, such as a relationship in time or circumstances between the disputed evidence and

¹¹ [Http://www.lawcom.gov.uk/library/lccp141/part-2.htm](http://www.lawcom.gov.uk/library/lccp141/part-2.htm) as on 01/07/19.

¹² [1894] AC 57.

¹³ [Http://www.lawcom.gov.uk/library/lccp141/part-2.htm](http://www.lawcom.gov.uk/library/lccp141/part-2.htm) as on 01/07/19.

¹⁴ [1975] AC 421.

¹⁵ Ibid.

¹⁶ [1991] 2 AC 447.

the facts of the offence charged, may achieve the same objective.¹⁷ In this case two complainants gave direct evidence of the commission of sexual offences against them by the accused. The complainants were the daughters of the accused, and they complained of a number of offences of incest and rape. The trial judge held that one daughter's allegations were admissible in relation to the others allegations, and could be used to corroborate them. The House of Lords held that the trial judge had been right. Lord Mackay, giving the leading speech, begged the question whether or not the evidence of the first victim provided "strong enough support for the evidence of the second victim",¹⁸ and, making the point more clearly, also said that it must "so strongly support the truth of [the] charge that it is fair to admit it notwithstanding its prejudicial effect."¹⁹

37.2.2.5 According to the United Kingdom Law Commission²⁰ similar fact evidence covers evidence -

- (1) of misconduct by the defendant, whether arising before or after the offence charged; and
- (2) of his or her propensity or disposition to misconduct himself or herself, either in general or in specific ways.

37.2.2.6 The United Kingdom Law Commission concludes that the term "similar fact evidence" is misleading because in category (1) evidence of "similar acts" would be more accurate, while in category (2) the expression is a complete misnomer.

37.2.2.7 The United Kingdom Law Commission explains the role of similar fact evidence as follows: it must be remembered that "one of the most deeply rooted and jealously guarded principles of our criminal law"²¹ is that the prosecution may not, in general, adduce evidence of

¹⁷ Ibid.

¹⁸ **DPP v P** [1991] 2 AC 447, 462D.

¹⁹ Ibid, at pp 462H463A.

²⁰ Ibid.

²¹ **Maxwell v DPP** [1935] AC 309 at 317 as quoted in <http://www.lawcom.gov.uk/library/lccp141/part-2.htm> as on 01/07/19.

occasions of previous bad conduct, other than those relating to the offence charged, nor of any disposition or propensity of the defendant to conduct himself or herself in any manner so as to establish or assist in the establishment of the case against him or her.

37.2.2.8 The United Kingdom Law Commission poses the question as to whether there should be a special rule in relation to similar fact evidence for sexual offences against children. In answer to this question, the United Kingdom Law Commission has found that originally it was thought that indecency against children was a “rare and peculiar offence, and, accordingly, evidence inferring a course of conduct is admitted as relevant”.²² However, the United Kingdom Law Commission now finds that the present position is as stated by the Court of Appeal in **Clarke**:²³ there is no specific category of offences against children for the purpose of similar fact evidence, because to assert that such offences are so rare as to justify admissibility is to ignore the regrettable fact that they are not uncommon.

37.2.2.9 The United Kingdom Law Commission also poses the question as to whether sex offences should be dealt with as a special category. It finds that the courts are very conscious of the prejudicial nature of certain types of sexual complaint, especially where the previous misconduct cannot be relied on as similar fact evidence. Thus in **Brooks**²⁴ the Court of Appeal held that, once the court had ruled that similar fact evidence was not involved, there could be no justification for the joinder of incest counts relating to alleged offences against the defendant’s three daughters. Although many aspects of that case were subsequently overruled by the House of Lords in **DPP v P**,²⁵ Lord Mackay suggested in the latter case that there had to be such a relationship between the different offences as to make them mutually corroborative: in other words,

²² Per Lord Sands in **Moorov v HM Advocate** 1930 JC 68, 89, and approved by Lord Hailsham in **DPP v Kilbourne** [1973] AC 729; and note the statement by Lord Goddard CJ in **Sims** [1946] KB 531, 540, and crimes of indecency against children of either sex “indicate a perverted lust” so as to guarantee admissibility as stated in <http://www.lawcom.gov.uk/library/lccp141/part-2.htm> as on 01/07/19.

²³ (1977) 67 Cr App R398.

²⁴ (1991) 92 Cr App R 36.

²⁵ (1991) 2 AC 447.

they had to be similar fact cases. In **Christou**,²⁶ however, the House of Lords held that there is no such rule, and that it is a matter for the discretion of the Judge.

37.2.2.10 More recently in the case of **R v R**²⁷ an allegation of rape of a girl under 16 which took place in a country outside the court's jurisdiction and before the coming into force of the Sex Offenders Act 1997, was made. The Appeal Court found that a re-trial was appropriate and that the conviction for rape must be quashed. More importantly, though, it was found that the evidence concerning the rape allegation could be admissible as similar fact or background evidence depending on the manner in which the judge exercises his or her discretion. Otton LJ cautioned though that great care was required when considering matters of similar fact and background evidence.

37.2.2.11 In the matter of **R v Z**²⁸ the defendant was charged with the offence of rape of a young woman in 1988. His defence was that she had consented, or that he believed she had consented to the intercourse. Prior to this charge, the defendant had faced four separate allegations of rape of different young women which resulted in four separate trials. In three of the trials the defendant was acquitted. In the fourth trial he was convicted. In each trial he had used the same defence, i.e. that the complainant had consented. The Crown submitted that the evidence of the four complainants was admissible under the similar facts rule. The trial judge ruled that the disputed testimony was subject to the similar fact evidence rule. The evidence of the first three complainants was inadmissible on the basis of the *autrefois acquit* or 'double jeopardy' principle, i.e. if a defendant had been acquitted in respect of a complaint made against him, evidence of the complaint is inadmissible in a subsequent trial, albeit, in a separate trial. The evidence of the fourth complainant was inadmissible on the ground that, standing on its own, the test of sufficient cogency was not satisfied. On appeal to the House of Lords, the Law Lords unanimously allowed the appeal on the following grounds -

²⁶ (1996) 2 WLR 620.

²⁷ CA (Crim Div): Otton LJ, Hidden J and Judge Richard Brown: 28 November 2000 as quoted in <http://www.lawreports.co.uk/crimnov0.5.htm> as on 01/07/19.

²⁸ June 22, 2000, House of Lords as quoted in <http://www.spr-consilio.com/evidrvzcase.html> at 01/17/19.

- (1) The extension of the *autrefois acquit* principle operated to empower a trial judge in a criminal case to exercise his discretion to stop a prosecution where a defendant was being prosecuted on the same or substantially the same facts that gave rise to a prior prosecution, which had resulted in an acquittal.
- (2) Subject to the above principle, evidence that was relevant on a subsequent prosecution was not inadmissible because it showed, or has a tendency to show, that the defendant was, in fact, guilty of an offence of which he had earlier been acquitted.
- (3) In the present case, the defendant was not placed in double jeopardy because the facts giving rise to the present prosecution were different from those that had given rise to the earlier prosecutions.
- (4) The evidence of the three complainants was not inadmissible because it showed that the defendant was, in fact, guilty of the offences of which he had earlier been acquitted.

37.2.2.12 The plea of *autrefois acquit* was not available to the accused in the present case because he was charged with a different offence of rape compared with the offences with which he was charged in the earlier trials. The *autrefois acquit* rule applies to the Crown which, in a subsequent trial of the same accused, is prevented from relying on evidence adduced in the unsuccessful earlier prosecution - the reason being to avoid the danger that the accused may be put on trial again for the offence of which he or she had been acquitted. In referring to **DPP v P**,²⁹ the House of Lords found that the essential feature underpinning the similar fact evidence rule is that its probative force in support of the fact in issue is sufficiently great to make it proper to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. The defendant's guilt may become overwhelming by virtue of evidence of a number of similar incidents. The fact that a number of witnesses are willing to come forward and, without collusion, give a similar account of the defendant's behaviour may enhance the credibility

²⁹ [1991] 2 A.C. 447.

of the witnesses and discredit the denials of the defendant.³⁰

37.2.2.13 Recent developments in the United Kingdom relating to the admission of similar fact evidence has seen the House of Lords ruling that the Crown Prosecution Service be allowed to raise a defendant's previous acquittals at trial.³¹ The convicted defendant had been charged with date rape and had previously been cleared at five trials of rape and convicted of two others. The Crown Prosecution Service presented evidence from four previous rape acquittals and one conviction and succeeded in prosecuting the defendant for the rape in question. Although the Law Lords held that the Crown Prosecution Service could introduce similar fact evidence of this nature, they also found that it would still be up to the individual judge as to whether he allowed similar fact evidence to be introduced, in each individual rape case.

37.2.3 Canada

37.2.3.1 In the recent Canadian Supreme Court Case **R v Shearing** (unreported) the issue arose as to whether the evidence from two minor sisters could be used as similar fact evidence, first, to assess the credibility of the complainants other than the sisters and, second, to rebut the accused's defence of honest belief in consent against the complainants other than the sisters. The judge found that there were sufficient similarities between all complaints, that the evidence was "highly relevant" in assessing the issue of consent and of innocent non-sexual purpose, and that the prejudicial effect of the evidence was outweighed by their probative value. The trial judge therefore allowed the jury to consider the similar fact evidence.

37.2.3.2 In the matter of **Her Majesty the Queen (Respondent) v. T.H. (Appellant)**³² in the Court of Appeal for Ontario, the appellant was charged with sexual offences in relation to his daughter and his two stepdaughters, alleged to have occurred 30 years prior to the case being heard while the appellant resided with their mother. Similar fact evidence was called with respect to sexual assaults of another young girl that occurred while the appellant lived with her mother. He

³⁰ [Http://www.spr-consilio.com/evidrvzcase.html](http://www.spr-consilio.com/evidrvzcase.html) at 01/07/19.

³¹ The Times 26th September 2000 at <http://www.borneo.co.uk/news/sep00/legalnews.html>.

³² Unreported: heard on the 4th December 2000.

was convicted of the sexual offences involving his two stepdaughters. The court of appeal found that the evidence against the appellant was overwhelming and that the fact that the jury acquitted the appellant on the charge of assault against his daughter is some indication that the jury did not misuse the similar fact evidence. The appeal was dismissed.

37.2.4 Australia

37.2.4.1 Section 55(1) of the **Commonwealth Evidence Act** of 1995³³ defines relevant evidence as evidence which must be capable, if accepted, of rationally affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue. Evidence is not inadmissible because it relates only to credibility of a witness, the admissibility of other evidence or failure to adduce evidence.

37.2.4.2 Section 56(2) of the **Commonwealth Evidence Act** further provides that irrelevant evidence is always inadmissible, while relevant evidence is admissible as provided for in the Act. As a result evidence of previous convictions is admissible if it is relevant and it does not fall within the scope of either the 'tendency rule' nor the 'coincidence rule' as provided for in section 56(1) of the **Commonwealth Evidence Act**.

37.2.4.3 Sections 97 and 101 of the **Commonwealth Evidence Act** deals with the 'tendency rule' and 'coincidence rule'. The former provides that evidence of character, reputation or conduct is not admissible to prove that a person had a tendency to act in a particular way, unless reasonable notice has been given to the other side and the court thinks that the evidence would have significant probative value. The latter provides that evidence of the occurrence of two or more related events is not admissible to prove that a person did a particular act, because the events are unlikely to have occurred coincidentally, unless the same requirements are satisfied. Section 101 further provides that the probative value must substantially outweigh any prejudicial effect it may have on the defendant.

37.2.5 United States of America

³³ Applicable in Australian Federal courts and courts in the Australian Capital Territory.

37.2.5.1 In the United States of America the position is guided by the **Federal Rules of Evidence Act** of 1975. Rule 401 provides that 'relevant evidence means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. There is a similar emphasis on the need for the probative value to outweigh any danger of unfair prejudice.

37.2.6 Germany

37.2.6.1 The **German Criminal Procedure Act** 1999 does not limit the judicial officer in the evaluation of evidence gathered in the course of the trial.³⁴ This is referred to as the principle of 'freie Beweiswürdigung'. Circumstantial evidence is not linked directly to relevant facts, thereby allowing the drawing of conclusions on the directly relevant facts of the particular case. Where previous convictions may be of importance for the finding of guilt, this evidence may be used as circumstantial evidence for the new offence being tried. This may be the case, for example, if they indicate a certain tendency/habitual character or action or a specific method of commission of a crime.³⁵

37.2.7 Namibia

37.2.7.1 The **Combating of Rape Act** of 2000 inserted section 211A into the Namibian **Criminal Procedure Act** of 1977. This section provides for the admission of evidence during criminal proceedings of similar offences by accused. Section 211A reads as follows:

Evidence during criminal proceedings of similar offences by accused

211A (1) Subject to the provisions of subsection (2), in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, evidence of the commission of other similar offences by the accused shall, on application made to it, be admitted by the court at such proceedings and may be considered on any matter to which it is relevant: Provided that such evidence shall only be so admitted if it has significant probative value that is not substantially outweighed by its potential for unfair

³⁴ Section 261 of the **German Criminal Procedure Act** 1999.

³⁵ Pfaff R of GTZ citing Kleinknecht/Meyer-Gossner: The Textbook on the German Criminal Procedure Act, 1999.

prejudice to the accused.

(2) Evidence of previous similar offences by an accused shall not be admissible solely to prove the character of the accused.

(3) The court's reasons for its decision to admit or refuse to admit evidence of previous similar offences shall be recorded, and shall form part of the record of the proceedings.

37.2.7.2 The motivation³⁶ for the incorporation of this provision into the **Criminal Procedure Act** as contained in the Report on the Combating of Rape Bill by the Parliamentary Standing Committee on Human Resources (February 2000) reads as follows:³⁷

The possibility of presenting evidence about the previous sexual conduct of the complainant should be balanced by a provision, which does the same for the accused, so as to provide symmetry on the question of previous sexual conduct of the parties concerned. Normally it is not possible to bring in evidence of previous convictions, on the grounds that an accused should be judged only in the case at hand and not prejudiced because of past conduct. The contention was, however, that just as it would be possible for the court to hear that the complainant has slept with the accused or other men on some past occasion, it should also be possible for the court to hear that the accused has committed previous rapes.

Under the United States Federal Rules of Evidence, in a sexual offence case "evidence of the defendant's commission of another offence or offences of sexual assault is admissible, and may be considered on any matter to which it is relevant" (28 USC Rule 413). This means that previous violent sexual conduct by the accused can be admitted for purposes such as showing a pattern of behaviour. This provision has apparently been upheld against constitutional challenge in a number of United States court cases.

37.3 Evaluation and recommendation

37.3.1 The rule dealing with the admissibility of similar fact evidence is undoubtedly complex. Its effect in any given case will depend very much on the facts of that case. This should not be seen necessarily as a defect in the rule. The value of the rule seems to lie in its flexibility to serve two competing purposes: to admit evidence that is genuinely relevant to the question of the accused's

³⁶ Information obtained from correspondence with the Legal Assistance Centre, Windhoek dated 24/07/01.

³⁷ Group submission by 13 non-governmental organisations to the parliamentary standing committee on human resources August 1999.

guilt; and to exclude evidence that is simply prejudicial to the interests of the accused.

37.3.2 Much can be written about the admissibility of similar fact evidence, but sufficient for present purposes is that the use of similar fact evidence has authoritatively been sanctioned in this country to establish identity,³⁸ to prove intent,³⁹ and to disprove innocent association.⁴⁰ Similar fact evidence has also been admitted to show a propensity to criminal conduct where, on the facts, disposition was highly relevant to the issue.⁴¹

37.3.3 A plethora of arguments abound in favour of and against the admission of similar fact evidence. **After weighing these arguments, the Commission finds that the benefit of admitting similar fact evidence in sexual offence trials and thereafter allowing the court to determine the relevance thereof, outweighs any detriment alleged to be experienced by the accused.** A few of the arguments against the admission of similar fact evidence are explored below.

37.3.4.1 One of the arguments in favour of excluding evidence of previous convictions is that such evidence will prejudice the jury against the accused. Paizes argues that the similar fact rule was formulated in accordance with the characteristics of the jury trial, and that since juries have long been abolished in South Africa, a consideration of the necessity and desirability of the similar fact rule is long overdue.⁴² He submits that where the trial is heard by a judge alone, the similar fact rule should be applied as no more than a cautionary rule. He opines that it is absurd to require a judge to exclude evidence “whenever he envisages that its reception might induce him wrongly to convict the accused: if he is able to perceive this risk, he will be able, too, to guard against it.”⁴³

³⁸ **S v Wilmot** 2001 (1) SACR 362 E.

³⁹ Van der Merwe, Morkel, Paizes and St Q Skeen **Evidence** Juta: Cape Town fourth impression 1993 at 80.

⁴⁰ **R v Simms** 1946 1 All ER 697.

⁴¹ Schwikkard at p60.

⁴² Schwikkard at p74.

⁴³ Ibid.

37.3.4.2 Protecting an accused against undue prejudice requires the presiding officer to make a number of important distinctions and balance a number of factors. At first glance, some of the distinctions and the requirements of balancing may appear contradictory but once the underlying principles are properly understood, a consistent approach can be discerned. When similar fact evidence is sought to be adduced, it is necessary, as is the case with evidence generally, to consider the fact in issue which the evidence is adduced to prove and the manner in which the evidence is relevant to the fact in issue. It is important even at this stage for the presiding officer to distinguish the probative force of the evidence from its prejudicial effect.

37.3.4.3 The probative force and prejudicial effect of similar fact evidence are collectively derived from both the nature of the evidence and the purpose for seeking to admit it in the given circumstances. The probative force arises from the relevant features of the evidence and its relationship with other direct evidence of the offence charged. The relevant features are those which have a sound relationship with the direct evidence. The prejudicial effect arises from other irrelevant features and connotations of the evidence, particularly its moral quality. The presiding officer then needs to assess as accurately as possible the strength of the probative force and prejudicial effect of the evidence. The manner in which the presiding officer actually considers and applies evidence of this nature is, of course, beyond legislative control.

37.3.4.4 **The Commission recommends that the developments in the United Kingdom in this regard should be followed and that the prosecution should be allowed to raise an accused's previous convictions and acquittals at trial, provided that the probative value of such evidence outweighs the prejudicial effect thereof.**

37.3.5 Another argument in favour of excluding similar fact evidence is the fact that there may be collusion between the complainant(s) and other witnesses in giving their accounts of events. This argument is used especially in cases where siblings or children are the victims of sexual offences. **In rebuttal the Commission is of the opinion that the decision as to whether or not there has been collusion should be left to the presiding officer.** The mere possibility of collusion should not prevent the similar fact evidence of one complainant from being admitted to prove the complaint made by another complainant. If the rule is applied here, it may exclude evidence of considerable probative value and deny the prosecution the right to produce the only corroborative evidence

available. This result is achieved without proving that the witnesses ever colluded.

37.3.6 Yet another argument is that the admission of such evidence may result in procedural unfairness or inconvenience. It is argued that the accused is frequently taken by surprise by this type of evidence and that the investigation into the collateral issues that arise out of the introduction of such evidence may lengthen the trial substantially. Seen in the light of the present system of disclosure between the prosecution and the defence, the element of surprise is negligible. However, careful management of the trial will necessitate that the court will have to determine whether there should be one trial or whether there should be separate trials for each charge. As stated above, if the complaints of a number of victims against one person are not heard in one trial, it will be necessary for the same witness to testify at more than one trial in order to introduce the similar fact evidence that the State wishes to rely on. **In view of the fact that repeat trauma is inevitable in such matters, the Commission recommends that similar fact evidence be allowed in those matters and that multiple appearances in court be avoided wherever possible.**

37.3.7 It is also argued that introducing similar fact evidence may undermine the administration of justice. This argument entails that the police might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter and may also focus on past offenders. In view of the fact that investigative guidelines and procedures coupled to departmental sanction for non-compliance are in force within SAPS, the Commission is of the opinion that this argument is unsound. Naturally a suspect's *modus operandi* and antecedents will form a crucial part of the investigation where the suspect has not yet been apprehended, is unknown, and where the police have a number of similar crimes that may have been committed by one person. However, each case investigated by the police will required different investigative techniques.

37.3.8 The tendency to regard similar fact evidence as evidence of bad character or evidence of criminal or bad disposition, is highly misleading. Similar fact evidence is evidence of a feature associated with an accused person or his or her circumstances which exists independently of the circumstances surrounding the commission of the alleged offence and which is relevant to the offence charged. Any probative value that similar fact evidence possesses, arises out of its descriptive quality while the prejudicial effect arises primarily out of its moral quality. Take for

example a case where an accused is charged with rape involving certain unusual features. Evidence of consensual sexual intercourse between the accused and his girlfriend involving the same unusual features would be similar fact evidence, as would evidence of a previous conviction of the accused for rape involving the same unusual features be. The probative force of both items of evidence would be the same. The lack of consent in the latter item of similar fact evidence (without regard to its moral connotations) is arguably a further similar feature which adds to the probative force of the evidence. However, the lack of consent in itself is of minimal probative force. The probative force of the latter is no greater for showing the accused to be of a “bad” or “criminal” disposition. The moral connotations of the evidence adds nothing to its probative force. However, while the former item of evidence is of negligible prejudicial effect, the prejudicial effect of the latter arises entirely from its moral connotations in showing the accused to be of “bad” or “criminal” disposition. The Commission endorses the submission that the distinction between the descriptive and moral qualities of similar fact evidence may sometimes be difficult to judge, particularly in respect of sexual offences, but it is a distinction that can and should be made if similar fact evidence is to be properly understood.⁴⁴

37.3.8 A good criminal justice system seeks to ensure that an accused person who has committed an offence alleged against him or her is convicted while one who has not is acquitted, subject at all times to the presumption of innocence. Relevant evidence is the basis for making the determination of innocence or guilt. However, given the nature of crime and the tendency of those who perpetrate crime to conduct their acts surreptitiously or to conceal their acts, the determination of guilt will sometimes have to be inferred from the overall circumstances of the case rather than decided upon direct, uncontroverted evidence. Similar fact evidence may occasionally be an important element in the overall circumstances of the case. Numerous cases, some cited above, reflect the failure to recognise the distinction between probative force and prejudicial effect which affects not only the determination of the appropriate test of admissibility, but its application and the consideration of the necessity or practicability of other safeguards. Once the distinction is made, however, it can be seen that similar fact evidence is not as different from other forms of evidence, particularly circumstantial evidence, as it might otherwise be thought to be. Excluding such evidence in all circumstances or admitting it without any safeguards may have very different effects on the outcome of the case but are equally drastic in terms of distorting the outcome of the criminal

⁴⁴ [Http://alternativeworlds.tripod.com/law/sfe-lqr.html](http://alternativeworlds.tripod.com/law/sfe-lqr.html) as on 01/07/19 at pp 8.

justice process. **The Commission recommends that a provision be included in the new Sexual Offences Act providing for the admission of similar fact evidence in sexual offence trials. This recommendation is based on the view that admitting the evidence, where strongly probative, subject to safeguards, is an effective compromise which is least distorting to the criminal justice process.**

37.3.9 This provision should read as follows:

Evidence of similar offences

- (1) A court before which criminal proceedings are pending where the accused is charged with the commission of any sexual offence, shall, subject to the provisions of subsection (2), admit evidence of the commission or alleged commission of similar offences by the accused on application made to such court and may consider such evidence in relation to any matter to which it is relevant.**
- (2) The court may only admit the evidence referred to in subsection (1) if such evidence -**
 - (a) has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused; and**
 - (b) is not intended merely to prove the character of the accused.**
- (3) The court shall record the reasons for its decision to admit or to refuse evidence as referred to in subsection (1) as part of the proceedings.**

CHAPTER 38**EXAMINATION OF WITNESSES****38.1 Introduction**

38.1.1 Examination of witnesses implies the questioning of a witness. Examination of witnesses is conducted either in person or through a legal representative. When a witness is questioned by the party (or parties) who did not call him or her, it is known as cross-examination.¹ Cross-examination of witnesses is seen by some as a cornerstone of the right to challenge the accuser. In fact it is one of many ways in which that challenge may be launched. The purpose is to elicit evidence favourable to the party cross-examining or to challenge the truth or accuracy of the evidence. This is done primarily through questions that are aimed at sowing confusion and obtaining contradictory responses to questions. The victim does not have the right to cross-examine or re-examine defence witnesses or any other witness. The State, the accused and the court have the right to cross-examine witnesses that they have not called. The presiding officer has a limited role and may ask questions of a witness, but may not compromise his or her impartiality.

38.2 Cross-examination of witnesses**38.2.1 Current law**

38.2.1.1 In South African law, the conduct of cross-examination is governed by a combination of legislation, ethical rules and case law.

38.2.1.2 Legislation

38.2.1.2.1 Section 166 of the **Criminal Procedure Act** 51 of 1977 sets out the rights of the accused and the State in relation to examination of witnesses. It provides that both the accused

1 Du Toit *et al* **Commentary on the Criminal Procedure Act** at p 22-20A.

and the State may cross-examine any party called by the other side, including witnesses called by the court. Subsection (3) empowers the court to curtail cross-examination if it is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably. This limitation in subsection (3) is undoubtedly constitutional and a justifiable limitation of the accused's right to a fair trial provided it is applied fairly in the particular circumstances.²

38.2.1.2.2 A wide latitude is afforded in cross-examination on matters which are entirely collateral to the issues in order to test the credibility of the witness, although even here the questions must be relevant. Cross-examination of the accused or witnesses as to their credibility entitles the party who called the witness to lead evidence to prove his or her credibility in the following cases:

- Bias. A witness may be asked about his or her relationship with a party and may also be asked if he or she has been bribed. If such matters are denied, contradicting evidence may be led.
- Previous convictions. Evidence may be led to contradict a witness who denies that he has been convicted of an offence.³
- Sections 197 and 211 of the **Criminal Procedure Act** 51 of 1977 provide that the accused who gives evidence may not be asked or be required to answer any question which tends to show that he has been convicted of or charged with any other offence than the one for which he or she is standing trial. It also provides four exceptions to this rule.⁴
- Evidence impeaching credit.

38.2.1.2.3 The court has the right to question a witness at any stage of the proceedings and the rule against leading questions does not apply. Very often questioning by the court does not take place until after re-examination. The main purpose of such questioning is to clear up any points which are still obscure.

38.2.1.2.4 As regards the accused, he or she has the right to a fair trial which includes the

2 Considered by van der Merwe in the 1997 **Stellenbosch Law Review** at page 348.

3 Section 190 of the **Criminal Procedure Act** 51 of 1977.

4 Section 197 (a) - (d) of the **Criminal Procedure Act** 51 of 1977.

following rights which are considered relevant to the issues and principles that relate to cross-examination of witnesses:

- to adduce and challenge evidence;⁵
- to prepare and present his or her defence, with legal assistance provided free of charge when substantial injustice would otherwise result;⁶
- to be presumed innocent, to remain silent and not to testify at the proceedings;⁷
- to choose and be represented by a legal practitioner;⁸
- the burden of proving the facts alleged is on the State prosecution.

38.2.1.2.5 As regards a witness (other than the accused), there are no specific rights in regard to cross-examination. Such witnesses do, however, have the following rights:

- to privacy⁹ (it is trite that privacy is to be respected insofar as this is consistent with the interests of justice);
- to have their inherent dignity respected;¹⁰
- not to be treated in a cruel, inhuman or degrading way;¹¹
- to bodily and psychological integrity.¹²

38.2.1.2.6 Accused persons likewise enjoy these protections and are also entitled to protection from abusive, protracted or undignified cross-examination. Unlike other witnesses, the accused has a potent remedy in review proceedings to strike down his or her conviction on the grounds of such

5 Section 35(3) **The Constitution of the Republic of South Africa** 108 of 1996.

6 Section 35 (3)(b) and (g) of Act 108 of 1996.

7 Section 35 (3)(h) of Act 108 of 1996.

8 Section 35(3) (f) of Act 108 of 1996.

9 Section 14 of Act 108 of 1996.

10 Section 10 of Act 108 of 1996.

11 Section 12(1)(e) of Act 108 of 1996.

12 Section 12(2) of Act 108 of 1996.

cross-examination.

38.2.1.3 Ethical rules

38.2.1.3.1 The South African legal profession is currently divided into two branches: that of advocates and attorneys. The principles relating to cross-examination have been laid down by the courts in their control of the proceedings before them. These apply to all defence counsel, whether attorneys or advocates. In the case of attorneys, infractions are punishable by the various Law Societies as a failure to perform professional work with the skill, care or attention or to the quality or standard as may be reasonably expected from an attorney.¹³

38.2.1.3.2 The conduct of advocates is governed by the **Rules of Professional Conduct** of the Bar of which the advocate is a member, the **Uniform Rules of Ethics** and the **Rules of Conduct Relating to Advocates**.¹⁴ Rule 3.3 of the **Uniform Rules of Ethics** sets out the duties regarding cross-examination of witnesses of witnesses. It provides that questions which affect the credibility of a witness by attacking his or her character, but not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true. If an advocate is instructed by an attorney that in his or her opinion the imputation is well-founded or true, and is not merely instructed to put the question, he is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and to put the question accordingly.¹⁵

38.2.1.3.3 Such questions, whether or not the imputation they convey is well-founded, should only be put if, in the opinion of the cross-examiner, the answers would or might materially affect the credibility of the witness; and should not be put if the imputation relates to matters so remote in time or of such a character that it would not affect the credibility of the witness.¹⁶

13 See rule 89 - 30 of the Rules of the Transvaal Law Society.

14 See **LAWSA** Volume 14 Butterworths Durban First Reissue 1999.

15 Rule 3.3.2.

16 Rule 3.3.4.

38.2.1.3.4 All advocates are answerable to the court for all matters concerning their profession and office.¹⁷ The **Admission of Advocates Act**¹⁸ provides that a court of any division may, upon application, suspend any person from practice as an advocate or order that his or her name be struck from the roll of advocates.

38.2.1.3.5 Finally, in all cases it is the duty of the advocate to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person and to exercise his or her own judgement both as to the substance and form of the question put.¹⁹

38.2.1.4 Case Law

38.2.1.4.1 It is important to note that South African common law recognises the principle that the right to cross-examine is not an absolute one, and that examination may be limited by the court where it appears to be unreasonable and a deliberate attempt to exhaust and humiliate a witness. This was confirmed by the Appellate Division in 1982 in the case of **R v Rall**.²⁰

38.2.1.4.2 Cross-examination is not limited to matters covered by the witness in examination in chief.²¹ Leading questions may be asked in cross-examination but there is a measure of dispute as to whether the leading questions may be asked of witnesses who are obviously favourable to the cross-examiners case.²² In **Novick & another v Comair Holdings Ltd & others**²³ it was held by the Witwatersrand Local Division that leading questions may be asked only by counsel representing

17 **LAWSA** Vol 14 at p 264.

18 Section 7 of Act 74 of 1964.

19 Rule 3.3.5.

20 1982 (1) SA 828 (A).

21 **Distillers Korporasie (SA) Bpk v Kotze** 1956 (1) SA 357 (A.).

22 **R v Milne and Erleigh** 1951 (1) SA 791 (A) in favour. **R v Ismail** 1943 CPD 418 against the proposition.

23 1979 (2) SA 116 (W).

interests truly adverse to the party calling the witness.²⁴

38.2.1.4.3 A party has a duty to cross-examine a witness on aspects of his or her evidence which are disputed. It is a cornerstone of the administration of criminal justice that counsel should put his or her case to the witnesses for the opposing side.²⁵ A failure to cross-examine should not generally be held against an undefended and unsophisticated accused. In **S v Sebatana**²⁶ the duty of the court to assist an undefended accused in cross-examination was emphasised. It is the duty of the accused to put relevant portions of his or her defence in cross-examination, but presiding officers must assist illiterate persons.²⁷

38.2.1.4.4 The accused's right of cross-examination should be explained to them and some indication as to how it is to be done should be given.²⁸

38.2.1.4.5 In the recent decision **S v Hendricks**²⁹ the limits of cross-examination were discussed. In this case an unrepresented accused was repeatedly interrupted by the prosecutor during cross-examination. On appeal it was held that a serious disregard of the boundaries of fair cross-examination conflicted with the ideas underlying the concepts of justice which are the basis of all civilised systems of criminal justice. It was further held that the prosecutor's duty to cross-examine fairly is more onerous in the case of an unrepresented accused. Unfair cross-examination undermines the dignity of the court and brings the administration of the court into disrepute.³⁰

24 Hoffmann & Zeffert at p 445 as quoted by Du Toit et al at p 22-21.

25 **President of the Republic of South Africa v South African Rugby Football Union** 2000(1) SA 1 (CC).

26 1983 (1) SA 809 (O.)

27 **S v Govazela** 1987 (4) SA 297 (O).

28 Du Toit et al **Commentary on the Criminal Procedure Act** at p 22-21.

29 1997 (1) SACR 174 (C).

30 Du Toit et al **Commentary on the Criminal Procedure Act** at p 22-22.

38.2.1.4.6 In **S v Motlabane and others**³¹ Judge Khumalo held that a judicial officer in a criminal case has a discretion to exclude evidence if the witness dies before cross-examination as the testimony is untested, or where a witness dies during cross-examination as it may result in there being an unfair trial.

38.2.1.4.7 There is no absolute rule that a failure to cross-examine precludes a party from disputing the truth of the evidence, but where a prosecutor fails it may be decisive.

38.2.1.4.8 A cross-examiner may not put questions as a statement of fact where the facts are not part of the cross-examiner's case. These questions may mislead a witness. Further, a cross-examiner may not assert that a witness has previously said something in his or her evidence which had in fact not been said.³²

38.2.1.4.9 Vexatious, abusive, oppressive or discourteous questions may be disallowed.³³ Misleading or vague questions should not be posed by a cross-examiner. Inadmissible evidence may not be adduced or elicited.³⁴

38.2.1.4.10 Judge Rose-Innes, in **S v Gidi and Another**,³⁵ had occasion to consider the duties of a cross-examining prosecutor and had the following to say:

Although cross-examination may and often must be thorough, complete and effective, cross-examination of an accused should always be impartial. It should not be biased or prejudiced against him, and should never seek to conceal or withhold evidence or facts known to the prosecutor which may favour the accused in his defence or may be of a mitigating nature. This follows from the purpose of cross-examination, and the duty of a

31 1995 2 SACR 528 B.

32 Du Toit et al **Commentary on the Criminal Procedure Act** at p 22-23 citing **S v Tswai** 1988 (1) SA 851 C.

33 **S v Booie & others** 1964 (1) SA244(E); **S v Gidi & another** 1984 (4) SA 537 (C); **S v Hendricks** 1997 (1) SACR 174(C).

34 **S v Nkwanyana** 1978 (3) SA 404 (N).

35 1984 (4) SA 537 (C) 539F-540E.

prosecutor, which is to assist the court in its enquiry into the true facts of the case and hence in the proper administration of justice. . . .

A proper cross-examination does not permit the gratuitous intimidation of an accused. A prosecutor should not bully an accused by insulting him, brow-beating him or adopting an overbearing attitude which admits of no contradiction by the accused of what is put to him. A prosecutor should not unnecessarily ridicule an accused or taunt him or offend his sensibilities or provoke him to anger, or play upon his emotions in order to place him at an unfair disadvantage and incapacitate him from answering questions to the best of his ability. In the case of many a witness it calls for no skill to intimidate or confuse or distress a witness who does not have the resources of intellect, language or personality to defend himself against a bullying prosecutor. Conduct of this kind offends against good manners, politeness and humanity. That is sufficient reason for refraining from such unseemly behaviour. What is more important for the administration of justice is that tactics of that kind are a negation of the object and purpose of cross-examination. Bullying interrogation is not directed at an enquiry into the true facts, but is calculated to intimidate an accused into fearful or hopeless concessions or admissions which may be untrue or to prevent an accused from having an opportunity to give an explanation of some circumstance for which there may be an exonerating or mitigating explanation. An accused must be given a fair chance to answer the question put to him. His answer must not be interrupted from the bar. The next question must not be put before the previous one has been fully answered.

38.2.1.4.11 These limitations on the conduct of cross-examination are patently justifiable in terms of the Constitution. The object of cross-examination is -³⁶

first, to elicit information that is favourable to the party on whose behalf the cross-examination is conducted and, secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such a party. It is therefore not open to an accused person to contend that his right to a fair trial has been infringed if the court intervenes to prevent his counsel from conducting a bullying or intimidating form of cross-examination, nor if it appears that his line of questioning is calculated to confuse the witness.

38.2.1.4.12 With specific reference to sexual offences, Donan AJ expressed the opinion, in **S v Cornelius**,³⁷ that the protection of the dignity of a rape victim may constitute a reasonable and justifiable limitation to an accused's right to a fair trial.³⁸ The cross-examination of the complainant by the unrepresented accused had lasted for an excessively long period of time, and had been filled with offensive elements which 'served no forensic purpose'. The court emphasised that in rape

36 **K v Regional Magistrate, Wynberg** 1996(1) SACR 442-443.

37 1999 JDR 0145 (C).

38 At 18.

cases, complainants are exposed to further trauma, possibly just as severe as the trauma caused by the crime.

38.2.1.4.13 While it is clear that the problems associated with cross-examination are not confined to rape and other sexual offence cases, the intimate and humiliating nature of the offences means that cross-examination has a particularly negative impact. This is heightened when the witness is young. Judge Melunsky explains -³⁹

child witnesses experience significant difficulties in dealing with the adversarial environment of a court room; a young person may experience difficulty in fully comprehending the language of legal proceedings and the role of the various participants; and that the adversarial procedure involves confrontation and extensive cross-examination. There is also an affidavit from Karen Muller who is presently engaged in research into the question of the ability of young witnesses to give evidence in an accusatorial environment. She explains and illustrates that the communication ability of the child and the context in which questions are asked may distort the meaning attached to the child's language. She says that in cases of criminal prosecutions for sexual offences the language problem becomes more acute because 'it is overlaid by a range of emotional stresses and fears which flow from the traumatic events about which the child is to testify.

38.3 Problems with the current position

38.3.1 Despite these legal and ethical rules, and extensive case authority on the limits of cross-examination and on the imperative of curial courtesy, the humiliation and intimidation of witnesses is a fairly common occurrence in South African courts. Cross-examination often takes the form of attacking, either directly or indirectly, the character and credibility of the victim. This dilemma was aptly described by Judge van Dijkhorst as follows -⁴⁰

Cross-examination, intended as a scalpel to excise the tumour of untruth, has become a bludgeon with which justice is slowly clubbed to death. We have elevated cross-examination to the status of a holy cow and forgotten its purpose. This often bloated beast has to be culled and replaced with one much leaner and more effective.

39 **K v Regional Magistrate Wynberg** 1996 (1) SACR at 442 - 443.

40 Per van Dijkhorst J in **S v Baleka** unreported judgement of the Transvaal Provincial Division case number 482/88 on the 15 /11/1988 as cited by Pretorius JP **Kruisondervraging in die Suid Afrikaanse Reg** (LLD thesis) University of Pretoria July 1992.

38.3.2 Victims are frequently so traumatised by the process that they do not give the best evidence that they could resulting in doubt as to the veracity of their version of the events and acquittals. Many victims have to endure days in the witness box during which the defence repeatedly tries to break them down by suggesting that they are lying, putting spurious reasons to them to suggest that they have cause to lie and generally attempting to establish the accused's innocence by destroying a victim's version through confusing, repeated questions that undermines the victim's credibility, attacks their personality and attempts to undermine their integrity. This frequently results in the court concluding that it cannot convict as the victim's evidence is too confusing. The very nature of cross-examination is to discredit a witness and although "cross-examination need not always be aggressive to be effective" it frequently is.

38.3.3. A good example of what has become the way in which cross-examination is seen and taught is provided by a course on cross-examination described as '**Killer Cross-Examination**'.⁴¹ Some of the topics covered include formulating questions to achieve control, training witnesses to say 'yes', when to create 'no' answers, making hostile witnesses adopt the words of the cross-examiner and psychological principles that establish control.

38.3.4 There appear to be varying attitudes of judges and magistrates as to what is appropriate in cross-examination. This leads to a large measure of uncertainty which appears to have been solved in a rather liberal manner by allowing rather than disallowing questions. This tendency may be the result of a concern to allow the accused the opportunity to defend him or herself as well as possible.

38.3.5 The result of such courtroom conduct is not conducive to establishing the truth from children. Professors G W Fouche and E J Hammond, in their book **The Child Witness**,⁴² had this to say of the process of cross-examination of children -⁴³

41 An American CLE Course held on 20 January 2000 in Vancouver.

43 Fouche GW and Hammond EJ Professors **The Child Witness** University of Natal Pietermaritzburg April 1987 at p 11-12.

During the course of our work on this project we have heard time and again from people who have been called to court in their professional capacities as policemen, pediatrician's, social workers and others of the horrors of observing a child witness under cross-examination. A general comment is that the child's credibility is deliberately broken down in lines of argument that are designed to confuse and upset. There is seldom felt to be enough intervention from the court to suggest moderation from counsel. We have been able to confirm these points from our own observations in court.

We have also been given details by numerous parents of child witnesses of the trauma experienced by their children during cross-examination. A common theme in their comments has been total disbelief that the regular practice of the law can allow this total disregard for a child's feelings. They have also commented on the subsequent confusion their children have gone through as a result of being accused of lying and making up stories.

38.3.6 Children do not have the capacity to withstand adult aggression and it is very easy to destroy a child witness.

38.3.7 If an accused person is cross-examined and the acceptable boundaries of cross-examination are overstepped, either the court hearing the matter may intervene, or the matter will be dealt with on appeal or review at which time the conviction and sentence may be set aside if rude or excessive cross-examination has resulted in a failure of justice.⁴⁴

38.3.8 If a witness, other than the accused, is subjected to rude or excessive cross-examination, the court may intervene. However, should the court fail to do so, the witness could lay a complaint of unprofessional conduct with the professional governing bodies of advocates and attorneys. If a disciplinary hearing is held, the responsible advocate or attorney may be disciplined.

38.3.9 If cross-examination of a witness, other than the accused, is of such a nature as to lead to a failure of justice, it is unlikely that the witness would want a re-trial due to the trauma associated with the court process. It is debatable whether a witness could insist on a re-trial as the accused may raise the defence of double jeopardy. The other option for a witness would be to sue the cross-examiner civilly for *contumelia* or defamation. No reported case could be found in which this had been done. The Commission concludes that there are no realistic remedies *ex post facto* for a witness (other than the accused) who has had to endure unacceptable cross-examination.

44 Section 322(1) of the **Criminal Procedure Act** 51 of 1977.

38.4 Submissions

38.4.1 **Ms WL Clark, Senior Public Prosecutor Verulam**, feels that no limits should be placed upon the right of the accused to cross-examine a child witness, as the very purpose of cross-examination is to help ensure that the accused is given a fair trial. However, there should be limits on the way that a youthful witness may be cross-examined. She is also of the opinion that the use of the intermediary system has gone a long way to ensure that the child is not unfairly badgered or subjected to harsh questioning as intermediaries can and do put aggressive questions in a much more child friendly manner. She feels however, that in cases where no intermediary is available (or used) the cross-examiner should be warned that no aggressive or hostile questions should be asked and that the questioning must be done in a sympathetic manner.

38.4.2 The **South African National Council for Child and Family Welfare** raises a concern about the constitutionality of limiting an accused's right to cross-examine, but are nevertheless overwhelmingly in favour of limits being placed upon the right to cross-examine children in sexual offence cases on previous statements made. They feel that the presiding officer should exercise greater control over cross-examination to prevent secondary abuse of the child. They also agree that the child should only be cross-examined at the actual trial if there are special circumstances requiring cross-examination.

38.4.3 The **Vryheid Child and Welfare Society** are of the opinion that a child should only be cross-examined at trial if there are special circumstances.

38.4.4 The **South African National Council for Child and Family Welfare** is in favour of limiting the right to cross-examine a child witness (including protection from verbal abuse by the defender's attorney), using a surrogate witness (24 response in favour and 10 against) and that the intermediary system with closed circuit television should be made compulsory. On the question of whether the child should be available for cross-examination, 23 respondents to the latter Council no while 14 were in favour. Of the respondents, 28 were in favour of the child only be cross-examined if there are special circumstances.

38.4.5 **Advocate R Songca** is of the view that if a child's evidence is captured via a

videotape, the child should only be cross-examined where there are glaring inconsistencies or serious allegations that the child was coached or if the allegations are considered to be possibly unfounded. **Ms Madonsela** expresses the view that the child witness should be available for cross-examination after videotaped evidence is accepted only if it is absolutely necessary. Similarly the **Department of Education (Director General)** believe that the child witness should only be cross-examined if there is doubt about the evidence.

38.5 **Comparative Analysis**

38.5.1 It is interesting to consider the developments in other countries which adopted the Anglo-American system. In addition, consideration of the civil law jurisdictions serves to illustrate the variety and possibilities that are available and used with success. This is an important aspect as the civil law jurisdictions deal with the same problem in a very different way and there is nothing to indicate that that system is not at least as effective as the Anglo-American system.

38.5.2.1 The applicable law of the jurisdictions considered below is found primarily in legislation and ethical rules. In addition, they may be affiliated to the International Bar Association which is a federation of National Bar Associations and Law Societies. In some jurisdictions the Codes of Legal Ethics are imposed on all practitioners by their respective Bar Associations or Law Societies or by the courts or administrative agencies having jurisdiction.⁴⁵

38.5.3 **United Kingdom**

38.5.3.1 Particularly important provisions are contained in sections 34 to 39 of the **Youth Justice and Criminal Evidence Act 1999**. Section 34 contains a general provision prohibiting an accused from personally cross-examining a complainant in criminal proceedings for sexual offences. Section 35 prohibits the accused from personally cross-examining a child complainant or child witness in criminal proceedings for, *inter alia*, sexual offences. The prohibition also applies to cross-examination in any other offences with which the accused is charged in those proceedings.

45 <http://www.nz-lawsoc.org.nz/about/profcon1.htm>.

38.5.3.2 Various procedural replacements for such cross-examination are provided for in sections 38 and 39. Section 38 provides that when an accused is prohibited from cross-examining in person, the accused must nominate a legal representative, failing which the court must appoint a legal representative to cross-examine the witness (if the court decides that it is necessary in the interests of justice for the witness to be cross-examined). It is explicitly stated that such a representative "shall not be responsible to the accused." Section 39 imposes a duty on the judge to give such warning as he considers necessary to prevent prejudicial inferences being drawn either from the mere fact that the accused is not cross-examining or the fact that a court appointed representative has cross-examined on his or her behalf.

38.5.3.3 These provisions have been highly controversial. The main concern is whether the absolute prohibition in rape and other sexual offences is justified. However, Lord Williams of Mostyn is of the following view -⁴⁶

What matters is the genuine fear that we have established... that women are reluctant to go to court because they fear the consequences, not of proper cross-examination or of questioning in the interests of the defendant, but of what in the past has amounted to grotesque humiliating bullying.

38.5.3.4 In addition to legislation, counsel's conduct is regulated by the Law Society's Code of Advocacy⁴⁷ in terms of which advocates conducting proceedings at court "must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person."⁴⁸ Further, advocates must not "suggest that a witness or other person is guilty of ... misconduct unless such allegations go to a matter in issue (including the credibility of the witness) which is material to their client's case and which appear to them to be supported by reasonable grounds".⁴⁹

46 **Milton Brown** [1998] 2 Cr App R 364 2nd reading HL 15/12/1998, Col 1305.

47 Law Society of England and Wales <http://www.guide-on-line.lawsociety.org.za>

48 Law Society's Code of Advocacy Annex 21A Part VII 7.1(e).

49 Law Society's Code of Advocacy Annex 21A Part VII 7.1(h).

38.5.4 **New Zealand**

38.5.4.1 In October 1996 the Law Commission of New Zealand released a discussion paper⁵⁰ on the Evidence of Children and other Vulnerable Witnesses. In it they make the proposition that “the rules governing how witnesses give evidence are intended to promote the rational ascertainment of facts. However, it is apparent that in the case of vulnerable witnesses these rules may actually hinder that process. Vulnerability in this sense may occur due to the characteristics of the witness, the relationship between the parties or the nature of the offence in a criminal case it is the difficulty these witnesses may have in giving evidence in the ordinary way which may limit the amount of reliable evidence they offer the court. For example, complainants in sexual cases may be embarrassed in giving evidence in open court or experience distress in doing so in front of the defendant, making them unable to give a full and coherent account and therefore affecting the amount and quality of evidence available to the fact finder”.

38.5.4.2 Against this background recommendations were made that pre-trial cross-examination of certain witnesses be allowed. The Law Commission of New Zealand concluded that there are difficulties with the cross-examination at the trial of a child whose evidence in chief is presented in the form of a videotaped interview. The interview may occur some time before the trial and delays may affect the reliability or the amount of evidence that the child is able to give at the trial. These difficulties may be reduced if cross-examination could take place before the trial in a relatively unpressurised environment.⁵¹

38.5.4.3 The Law Commission of New Zealand put forward the suggestion that the bar on personal cross-examination of a child victim or a mentally handicapped victim by an unrepresented accused should continue.

38.5.4.4 In addition, conduct of counsel during cross-examination is governed by the New

50 Preliminary paper 26.

51 Law Commission of New Zealand **The Evidence of Children and other Vulnerable Witnesses** Preliminary Paper 26 paragraph 144 at p 37.

Zealand Law Society **Rules of Professional Conduct for Barristers and Solicitors**.⁵² Rule 10.02 provides that “counsel must not in the course of making submissions or cross-examining a witness say or lead a witness to say anything that might mislead the court. In particular counsel must not make any statement to the court or put any proposition to a witness that is not supported by reasonable instruction or that lacks factual foundation by reference to the information available to the court.”

38.5.4.5 The commentary to this rule explains that counsel has a particular duty when cross-examining, not to put to the witness allegations in the form of questions which counsel knows that the witness does not have the necessary information or knowledge to answer, or where there is no justifiable foundation for the question.

38.5.5 **Australia**

38.5.5.1 **Victoria**

38.5.5.1.1 The Law Reform Commission of Victoria conducted a study to ascertain the themes in cross-examination in rape trials as it is a common criticism is that complainants in rape trials are often subjected to questioning of an offensive or prejudicial nature which may be only of marginal relevance.⁵³

38.5.5.1.2 The Report that was developed from the above study contained some general observations, namely:

- (i) Motives for false reports. It was common practice for defence counsel to put it to the complainant that she had a motive for making a false report. In the case study undertaken this was the case in a number of cases even though the complainant had incurred physical injuries requiring medical treatment or hospitalisation. A wide range of motives for making

52 www.nz-lawsoc.org.nz “About the NZLS”Rule 10.02 commentary 1.

53 Law Reform Commission of Victoria **Rape: Reform of Law and Procedure** Appendixes to Interim Report No.42 at p 104-110.

false reports was suggested, for example:

- to cover up the fact that the complainant was a prostitute
 - to avoid being seen as unfaithful to a husband or boyfriend
 - to gain attention from members of the family
 - to avoid being disciplined by parents for being out late, or for being somewhere without permission
 - to legitimise a claim for crimes compensation
 - to gain revenge on the accused
 - to fulfill the criteria of 'special circumstances' required by the Ministry of Housing to approve a swop of residence with another family in the town.
 -
- (ii) Delay in laying a charge. In 80% of the trials, the prosecution led evidence of recent complaint. However, this did not prevent the defence from raising the issue of late complaint in a large proportion of the trials. As a result about half of the complainants were asked why they did not tell the first person they saw or why they had not complained directly to the police.
- (iii) Drinking behaviour. More than half the complainants were asked about how much they had drunk on the day in question, frequently at considerable length.
- (iv) Sexually provocative behaviour. More than a third of the complainants were asked if they had behaved in a sexually provocative way towards the accused. One trial included questions as to whether the complainant possessed erotic videos.
- (v) Clothing. A relatively small minority of complainants were asked if they were dressed in a sexually provocative way.
- (vi) Mental / emotional stability. A very small majority of complainants were asked about their general mental or emotional stability.

38.5.5.1.3 These results were then compared against complainants in assault cases. In

summary the Law Reform Commission of Victoria concluded that the trial dockets that they surveyed provided clear quantitative evidence that rape trials are stressful experiences for complainants. Moreover, the comparison with assault trials suggests that although a lot of the themes in cross-examination are similar, rape trials are different, at least as far as the length and vigour of cross-examination of complainants are concerned.⁵⁴

38.5.5.1.4 Section 39 of the Victorian **Evidence Act** 1958 empowers the court to forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

38.5.6 In Queensland, sections 20 and 21(1) of the **Evidence Act** 1997 deal specifically with cross-examination. They provide as follows:

Section 20 “Where any question put to a witness in cross-examination is not relevant to the proceeding except in so far as the truth of the matter suggested by the question affects the credit of the witness by injuring the character of the witness, the court has the discretion to disallow the question if, in its opinion, the matter is so remote in time or is of such a nature that an admission of its truth would not materially affect the credibility of the witness.”

Section 21 (1) “A court may disallow a question which, in the opinion of the court, is indecent or scandalous unless the question relates to a fact in issue in the proceedings or to matters necessary to be known in order to determine whether or not the facts in issues existed.

(2) A court may disallow a question which, in the opinion of the court, is intended only to insult or annoy or is needlessly offensive in form.”

38.5.6.1 Section 29(2) of the **Evidence Act** 1995 provides that a witness may give evidence wholly or partly in narrative form if the party who has called the witness has applied to the court for a direction that the witness give evidence in that form and the court so directs.

38.5.6.2 The **Evidence Act** 1906 of Western Australia (WA) goes further than the ethical

54 Law Reform Commission of Victoria **Rape: Reform of Law and Procedure** Appendixes to Interim Report No.42 at p 110.

rules in the United Kingdom in terms of which questions are permissible provided that the question is not only intended to vilify, insult or annoy. Section 26 of the **Evidence Act 1906** (WA) empowers a court to forbid any question it regards as indecent or scandalous, although such question may have some bearing on the case before the court, unless the question relates to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issues existed or not. The court may also forbid questions which it regards as intended to insult or annoy, or are needlessly offensive in form, notwithstanding that such question may be proper in itself.

38.5.7 **Norway**⁵⁵

38.5.7.1 In Norway there are detailed rules on the role of the presiding officer in relation to children as witnesses. The first of these was enacted in 1926 as a result of pressure from the National Association of Women who were concerned “with the adverse effects of interrogation of the child in court, sometimes repeated interrogations with intervals of several months”.⁵⁶

38.5.7.2 New rules were introduced in Norway for children under 16 years which provide for a judicial interview of the witness out of court by an examining magistrate. The examining magistrate writes a report of the child’s testimony which is presented at the hearing, and normally adds to the report his or her personal impression of the child’s maturity and trustworthiness. The interview may take place in the magistrate’s chambers or domestic surroundings or some other place where the child feels more comfortable.⁵⁷ “This statement is read at the trial as a substitute for the child’s testimony”⁵⁸ and the child “is only summoned to court if there are special reasons for this, for example if the physical maturity of the child is of importance or, there is question of identification of the offender.”⁵⁹

55 Also used in France see further Judge H Hamon The Testimony of the child victim of intra-familial sexual abuse, **Children’s evidence in Legal Proceedings**, supra at p 52-67.

56 Andenaes J The Scandinavian Countries **Children’s Evidence in Legal Proceedings** An International Perspective at p 10. 26-28 June 1989, Selwyn College Cambridge.

57 Andenaes J at p 12.

58 Andenaes J at p 12.

59 Andeneas J at p 12.

38.5.7.3 The Norwegian experience supports the body of world experience on the cross-examination of children -⁶⁰

The use of the record of an out of court interview, is of course, in conflict with the ordinary rules of criminal procedure. The trial court does not see and hear the witness, and the parties are deprived of their right to examination and cross-examination. The primary purpose of the reform was to protect the child, but other considerations played a role as well. The memory of the child is short, and the overwhelming experience of the court room may be paralysing, especially in the solemn atmosphere... This procedure is foreign to our present criminal procedure, but the question has to be confronted; do the rules exist for justice or does justice exist for the rules? The need to ensure a just system of criminal procedure for the most vulnerable victims of our society must take precedence over rules which are damaging and do not necessarily establish the truth. It is worth noting that in the Norwegian "judges and state attorneys expressed the opinion that the first testimony of the child is more reliable than what the child is able to tell at the trial, perhaps many months later. The feeling was that the reform was not only to the advantage of the child, but also gave a better basis for a verdict.

38.5.7.4 The Norwegian Code of Criminal Procedure was amended in 1981 and the procedure of a judicial interview was retained. In 1985 the age limit was lowered from 16 to 14 years provided there is the possibility of removing the accused during the examination of the child.

38.5.7.5 Furthermore, the examining magistrate may call for a qualified person to assist in the interview and the interview should be audio taped if possible. This tape recording must be done without interruption and must include the introductory conversation. There was a move to allow defence counsel and the prosecutor to be present, but objections were raised that the presence of the additional persons would change the atmosphere and make it more difficult to get open answers from the child. Accordingly that recommendation was dropped. It was also felt that the examining magistrate could be requested to put additional questions to the child.

38.5.7.6 There is a general recognition internationally that certain steps should be taken to protect a child witness. Many jurisdictions now use closed circuit television so that the child is not in court with the perpetrator, but in another room that is linked to the court through a television. Other developments include extending the use of intermediaries and video taping evidence in chief. These possibilities are not discussed in great detail as they have already been dealt with as individual topics

60 Andeneas at p 11-12.

in this Discussion Paper.

38.5.8 **Germany**⁶¹

38.5.8.1 In Germany the position is regulated by the **German Code of Criminal Procedure** (StPO). Paragraph (§) 241a of the StPO stipulates that witnesses under the age of 16 years may be examined only by the presiding judicial officer alone (and not by the whole court). The aim of this section is to protect the child from psychological pressure as far as possible, but also to establish the truth more reliably. Other parties wanting to examine the child have to direct questions to the presiding judicial officer first, who in turn has to direct them to the child. The presiding officer may refuse to do so if the questions undermine the rationale of this section which is the protection of the child/juvenile witness. For example, the pressure would be too strong, the question does not contribute to finding the truth (irrelevance) or is not permitted for other reasons (inadmissibility).

38.5.8.2 In principle the court may assess the credibility of the child witness on its own without consulting an expert witness (psychologist).⁶² This happens especially if the testimony is clearly supported or dismissed by other testimonies, proofs or circumstances.⁶³ However, the specific circumstances of the case can require consultation. This is particularly the case if the child is younger than four and half years⁶⁴ or if the child behaves in an abnormal way.⁶⁵

38.5.8.3 According to § 247 of the StPO, the court can order the accused to leave the court room during the examination to protect child and juvenile witnesses under the age of 16 years.

61 The entire section on Germany was translated and written by Mr R Pfaff (Magistrate) and Mr S Moser of the German Technical Cooperation (GTZ).

62 See BGHst (Bundesgerichtshof, Supreme Court of Appeal) 3, 52; Neue Zeitschrift für Strafrecht 198 at p 400; 1985 at p 420; 1997 at p 355.

63 BGHSt 7 p 82 and p 85; BGH Strafverteidiger 1995 at p 115; Oberlandesgericht Köln, Neue Juristische Wochenzeitung 1966 at p 1183.

64 Oberlandesgericht Zweibrücken Strafverteidiger 1995 at p 293.

65 Bgh Strafverteidiger 1991 at p 547.

38.5.8.4 §172 Nr. 4 of the **German Judicature Act** (Gerichtsverfassungsgesetz) stipulates that the public can be excluded during the examination of a child or juvenile witness under the age of 16 years. The justification is that giving testimony before the general public constitutes a heavy psychological burden for a young witness. The exclusion of the public ensures better protection of the witness and constitutes an environment that is conducive to establishing the truth. The interest of the public to be fully informed consequently takes second place.

38.6 Evaluation

38.6.1 It is a fundamental principle of the South African legal system that a criminal trial must be fair. However, since it is the accused who is on trial, this has led to an approach which has “traditionally been answered only in relation to whether it is fair to the accused. Since the whole trial process is directed towards answering the question of whether or not the accused is guilty of the crime alleged, this is hardly surprising. There have, however, in recent times been increasing calls for attention to be paid to whether the court process is also fair to those other than the accused who are required to take part in it, namely those called witnesses, and in particular those who are the victims of the crime alleged”.⁶⁶

38.6.2 Many victims in sexual assault cases find it harrowing to give evidence regarding the events. This dramatically affects a witness’s willingness to come forward and his or her ability to give an accurate, coherent and full account of what occurred and consequently calls into question the ability of the court to make a real assessment of the facts. South African law has responded by introducing a variety of measures to assist witnesses, and in particular children. These measures allow evidence to be led by way of closed circuit television and the use of intermediaries. While these measures are to be welcomed and should be developed further, they do not fully address the problems that cross-examination pose for the criminal justice system, particularly in relation to victims of sexual offences.

38.6.3 How should this be addressed? Three options are posed for consideration:

66 Scottish Executive Consultations **REDRESSING THE BALANCE Cross-examination in Rape and Sexual Offence Trials A Pre-Legislative Consultation Document** at p 1.
<http://www.scotland.gov.uk/consultations/justice/rtb-04.asp>

38.6.3.1 The first option is to disallow cross-examination of all child victims and in place thereof have the presiding officer conduct a judicial examination in chambers without the formality of a gown and the court environment. An audio taped transcript of the interview could then be played in court. Any questions that the defence may wish to put would be submitted to the presiding officer and done through that officer.

38.6.3.2 The second option is placing limits on cross-examination. There are two schools of thought: those that hold that the courts have been disappointing in failing to exercise their discretion to prevent unduly lengthy and traumatic cross-examination of victims of sexual assault, and those that hold that cross-examination is critical to ensuring justice and the accused's right to defend him or herself. It is important to bear in mind that the problems with cross-examination and the frequent secondary victimisation it causes or may cause undermines the very objective of a criminal trial, namely, a determination of whether the accused is guilty beyond reasonable doubt. This can only be established by evidence put forward by the State. It follows that it is essential, if the interests of justice are to be met, that witnesses should be willing and able to come to court to give evidence and should not be discouraged from doing so as a result of fears about the ordeal that they may encounter the witness box.⁶⁷

38.6.3.3 The third option is to maintain the *status quo* and to codify the common law, the principles set out in the case law and the principles as contained in the Bar Council Rules.

38.6.4 The Commission has come to the conclusion that the current controls and limitations on cross-examination have not been particularly successful. **Consequently, it is necessary to regulate cross-examination by clarifying the permissible boundaries of cross-examination and codifying it.** This is critical for a number of reasons:

- • To maintain the respect of the public for the courts which underpins the basic duty to abide

67 Scottish Executive Consultations **REDRESSING THE BALANCE Cross-examination in Rape and Sexual Offence Trials A Pre-Legislative Consultation Document** at p 1.

by the laws. As Judge Rose Innes says in **S v Gidi**,⁶⁸ “unfair cross-examination of the kind that occurred at this trial damages the proper decorum of the courts and will, if permitted, bring the courts into disrepute, and is adverse to the administration of justice. The Court of review, therefore, will not tolerate conduct of the kind described in this judgment”.

- To protect victims from a process that is not necessary to establish the truth and to ensure that their psychological integrity is not deliberately destroyed or undermined. This will hopefully encourage more victims to come forward and engender greater confidence in the court process.
- To increase the conviction rate where the particular offender has committed the offence in question. Frequently an acquittal does not necessarily mean that the sexual offence was not committed by the accused, but that the State’s ability to establish that guilt has been undermined by cross-examination that is designed to obfuscate the truth.
- To ensure acceptance by as wide a community as possible, the justice process must be able to protect the most vulnerable of all victims. The criminal justice system within South Africa must take active steps to minimise the secondary trauma that is caused by the system.

38.6.5 Although there may be great resistance to a new method of regulating cross-examination, the Commission believes that the time has come for reform of this area of the law. In making the following recommendations the Commission is mindful of the fact that there are real limitations on the extent to which the needs of victims can be entirely met in this regard as there will always be, at least within the adversarial trial process, a tension between the right to challenge evidence and the need to limit the manner in which it is adduced. The Commission does not foresee that the undermentioned changes will impinge on the rights of the accused or their legal advisers, but will minimise the distress that witnesses experience while testifying.

38.6.5.1 Firstly, **the Commission proposes to introduce, in the form of primary legislation, a prohibition on questions in cross-examination that are scandalous, insulting or vilifying.**

68 1984(4) SA 537 (C) at 554 A.

This will empower the court to forbid any question it regards as indecent or scandalous, although such question may have some bearing on the case before the court, unless the question relates to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issues existed or not. The court may also forbid questions which it regards as intended to insult or annoy, or are needlessly offensive in form, although that such question may be proper in a different context.

38.6.5.2 It is suggested that the formulation of this provision follow the tenor and content of the Appellate Division in *R v Rall*⁶⁹ and Judge Rose-Innes in *S v Gidi and Another*.⁷⁰

38.6.5.3 It is vital that this provision be contained in primary legislation. The new sexual offences legislation appears to be the most obvious place to ensure that it is authoritatively incorporated into current court-room practice. It should strengthen the ability of presiding officers to contain improper cross-examination and should form part of the training of future judicial and court officials.

38.6.5.4 Secondly, the Commission recommends that a witness, the accused or the State may object to questions which are scandalous, insulting or intended to annoy, or to the manner in which the cross-examination is being conducted.

38.6.5.5 Thirdly, the Commission poses the question of whether a person accused of a sexual offence should be prohibited from personally cross-examining the complainant. One option is to formulate a legal rule along the lines of sections 34 to 39 of the United Kingdom's **Youth Justice and Criminal Evidence Act** 1999.⁷¹ To place such a provision in the South African context, the Commission puts forward the following issues for consideration: if the accused is unrepresented, the various protective measures either already in existence or proposed elsewhere in this Discussion Paper could be adequate to protect the complainant or other witness. Alternatively, the court should

69 1982 (1) SA 828 (A)

70 1984 (4) SA 537 (C) 539F-538E.

71 The terms of this Act are discussed in detail above

appoint a legal representative to conduct the cross-examination in question. The court would only be empowered to make such an appointment once it has been established that State legal aid is available to pay for such a representative. If no State legal aid is available or the accused refuses the assistance of a legal representative, the court should have the discretion, in the interests of justice, to put the accused's version to the witness⁷² and to take over the questioning on behalf of the accused, alternatively to appoint an intermediary through whom questions may be put by either the accused or the court. **The Commission makes no recommendation in this regard and calls for comment on this option.**

38.6.5.7 Fourthly, the Commission is concerned that if there are a number of co-accused who repeatedly ask questions on the same points, the victim will suffer unnecessary trauma and confusion. In the United Kingdom this problem was raised in **Speaking Up for Justice**⁷³ and it was recommended that in the case of multi-defendant cases, in order to reduce the trauma of repeated examination on the same points, once a particular point has been made during cross-examination counsel for the co-accused should be encouraged to say "I adopt the challenge of previous counsel on point x but wish to question you on additional question y".⁷⁴ This recommendation was not accepted and as a result has not been enacted. It is easy to anticipate the difficulties with a limitation of this nature on questioning on behalf of an accused and his or her ability to defend him or herself fully against the allegations of the state. The Commission has come to the conclusion that each accused should be entitled to put the same question to the witnesses. **As such the Commission makes no legislative recommendation in this regard.**

38.6.510 Fifthly, the Commission is concerned about the use of repetitive questions to confuse witnesses. Repetitive questions are frequently seen as a trick which can have devastating effects on the a witness, particularly a child witness. Children are simply too young to repeat the same fact again and again. They will feel intimidated by the process and may feel that they have said something wrong and may even change the answer to try and please an adult. **The Commission**

72 Similar to Recommendation 62 in **Speaking up for Justice** at p 13.

73 Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice Process UK Home Office June 1998 at p 11.

74 Recommendation 44 **Speaking Up for Justice** p 11.

recommends that repetitive pointless questioning should not be allowed. Further, that the witness, or the State may object thereto.

38.7 **Recommendations**

1. **Amendment of section 166 of Act 51 of 1977**

x. Section 166 of the Criminal Procedure Act, 1977, is hereby amended by the insertion after subsection (3) of the following subsection:

(4) If it appears to a court that any cross-examination contemplated in this section is scandalous, vilifying, insulting, unduly repetitive, needlessly annoying, intimidating or offensive, the court may, on its own initiative or upon objection from any witness, the prosecution or the defence, forbid the cross-examiner from pursuing such line of examination unless the examination, in that form, relates to a fact or facts in issue or to matters that require revelation in order to determine the existence or absence of a fact or facts in issue.

CHAPTER 39**DISCHARGE OF THE ACCUSED AND THE DEFENCE CASE****39.1 Introduction**

39.1.1 If at the close of the State's case at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he or she may be convicted on the charge, it may return a verdict of not guilty.¹ The words 'no evidence' in section 174 of the **Criminal Procedure Act** 51 of 1977 has been interpreted to mean no evidence upon which a reasonable person acting carefully *may* convict.² It has been held that the decision to refuse a discharge is a matter solely within the discretion of the presiding officer and may not be questioned on appeal.³

39.1.2 In the recent, as yet unreported case of **Lubaxa v The State**,⁴ the question was raised in appeal against the conviction of whether the trial court's discretion was removed by section 35(3) of the 1996 Constitution which guarantees every accused person the right to a fair trial. If it had, the trial court was bound as a matter of law to discharge the appellant in the interests of a fair trial, and the failure to do so would amount to an irregularity which may vitiate the conviction.

39.1.3 The Supreme Court of Appeal held⁵ that an accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. Further, the right to be discharged at the close of the State case does not necessarily arise from considerations relating to burden of

1 Section 174 of the **Criminal Procedure Act** 51 of 1977.

2 See Du Toit et al and the cases cited therein at p 22-32D.

3 **R v Lakatula & others** 1919 AD 362.

4 Case No: 372/2/2000 Supreme Court of Appeal. Judgement handed down on the 25 September 2001.

5 Per Nugent AJA at 13 - 15.

proof (or its concomitant, the presumption of innocence) or the right to silence or the right not to testify, but arguably from a consideration that is of more general application. However, it held that the prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self evident why the prosecution should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. Finally, what is entailed by a fair trial must necessarily be determined by the particular circumstances and is not a question to be answered in the abstract.⁶

39.1.4 If there is a case to meet and the accused is not discharged, the accused then has the opportunity to challenge the case made out by the State. This is done in various ways. The defence may cross-examine the State's witnesses to undermine the case against the accused and in addition give evidence him or herself. Further, the accused may call his or her own witnesses to refute the State's version of the events.

39.2 The accused's right to silence⁷

39.2.1 An accused person has the right to remain silent. The right to remain silent can be described as the absence of a legal obligation to speak.⁸

39.2.2 At common law it is clear that the right to remain silent prohibited the courts from drawing adverse inferences from silence at the investigative stage of the proceedings. In terms of the common law the only time at which an adverse inference from silence was permissible was after the prosecution had established a *prima facie* case.⁹ This prohibited the drawing of adverse inferences from silence at the plea stage. This common-law right to remain silent has been reinforced by sections 35(1)(a) and 35(3)(h) of the Constitution which provides as follows:

6 Per Nugent AJA at 16.

7 The discussion on the accused's right to remain silent has been reproduced from the South African Law Commission **Discussion Paper 96**: Simplification of the Criminal Procedure Act 51 of 1977. See page 69 - 74 thereof.

8 **R v Esposito** (1985) 49 CR (3d) 193 (Ont.C.A).

9 See for example **S v Mthetwa** 1972 (3) SA 766 (A); **S v Snyman** 1968 (2) 582 (A); **S v Letsoko** 1964 (4) SA 768 (A); **R v Ismail** 1952 (1) SA 204 (A).

- 39.2.3 **Section 35(1)** Everyone who is arrested for allegedly committing an offence has the right-
- (a) to remain silent;
 - (b) to be informed promptly-
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;

Section 35(3)(h) Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings;

39.2.4 Where the State has established a *prima facie* case against the accused and the accused fails to testify or adduce any other evidence, the court is required to base its decision on the uncontradicted evidence of the State. In this situation it is possible, indeed common, that the *prima facie* case will be sufficient to sustain a conviction. In other words, although the accused's silence may not be treated as an item of evidence, he or she will incur the risk of conviction on the basis of the State's uncontradicted *prima facie* case. However, any inference must be drawn from the uncontroverted evidence and not from silence.¹⁰

39.2.5 The scope of this legal immunity is contentious. The High Court in **S v Brown**¹¹ held that whilst the right to remain silent was recognised at common law, its constitutional status required a change in emphasis as regards its application. The most obvious change is that any infringement of the right to remain silent is required to be justified with reference to the limitations clause.¹² *Buyis J*, finding that the use of silence as an item of evidence amounted to an indirect

10 See also **S v Scholtz** 1996 (2) SACR 40 (NC). See also SE Van der Merwe 'The constitutional passive defence right of an accused versus prosecutorial and judicial comment on silence: must we follow **Griffin v California**' (1994) *Obiter* 1.

11 1996(2) SACR 49 (NC). In **Brown** the issue before the court was the admissibility of a pointing-out and accompanying statement at the conclusion of trial within a trial. The court, finding that the State had through direct evidence established that the accused had not been assaulted and had made the statement and pointing-out voluntarily considered whether any adverse inference could be drawn from the accused's failure to testify. It held that whilst no adverse inference could be drawn from the accused's silence, in the absence of evidence contradicting the *prima facie* evidence presented by the State it was persuaded beyond reasonable doubt that the pointing-out and statement had been made voluntarily.

12 See **S v Bhulwana; S v Gwadiso** 1995 (2) SACR 748 (CC) at 16.

compulsion to testify and the drawing of an adverse inference from silence diminished and possibly nullified the right to remain silent, held that it would be unconstitutional for the court to draw an adverse inference where accused persons elect to exercise their constitutional right to remain silent.¹³

39.2.6 Reaching the opposite conclusion (and without reference to **S v Brown**), the court in **S v Lavehengwa**¹⁴ fully endorsed the view of Trengove J¹⁵ that an adverse inference could be permitted in appropriate circumstances, based on the following reasons:

It accords, first, with common sense. The inference is permissible only when the accused fails to give evidence despite the fact that the prosecution evidence strongly indicate guilt, an innocent accused would have refuted evidence against him, and there is no other explanation of his failure to do so. In these circumstances common sense demands that an inference be drawn and human nature is such that one would be all but inevitable. It has indeed been suggested that 'no rule of law can effectively legislate against the drawing of an inference from a failure to testify'. Secondly, it is not mere sophistry to reason, ... that an accused's right to remain silent is not denied or eroded by an inference drawn from his choice to exercise that right in circumstances where an innocent person would not have chosen to do so. It is suggested thirdly that, even if the rule permitting an adverse inference impinged upon the right of the accused to remain silent, it is any event probably a justifiable limitation.¹⁶

39.2.7 Whilst these two court judgments diverge as to the constitutional permissibility of drawing adverse inferences from silence at trial, both accept that no question of an inference being

13 **Brown** at p 62.

14 1996 (2) SACR 453 (W).

15 Chaskalson et al eds **Constitutional Law of South Africa** Kenwyn Juta Revision Service 5 30 June 1999 at p 26-14 to 26-16.

16 Supra 487. The court in **Lavehengwa** was required to consider, inter alia, whether the summary procedure in s 108 of the Magistrates Court Act 32 of 1944, applicable to a charge of contempt of court, infringed the accused's right to be presumed innocent and to remain silent. This arose because a magistrate, once he believes unlawful conduct justifies a conviction under s 108(1), may ask the accused to show cause why he should not be convicted. The court found that this procedure was analogous to the shifting of an evidentiary burden once the prosecution has established a prima facie case. The court held that the ultimate test in determining whether s 108 contravened the presumption of innocence was whether the accused could be convicted despite the existence of a reasonable doubt. Consequently, as the standard of proof beyond a reasonable doubt still had to be met in contempt proceedings the procedure employed could not be said to infringe the presumption of innocence.

drawn will arise until the prosecution has established a *prima facie* case.¹⁷

39.2.8 I In **R v Noble**¹⁸ the Canadian Supreme Court was required to consider the circumstances under which (if any) a trier of fact may draw an adverse inference from the failure of an accused to give evidence. Sopinka J (L'Heureux-Dube, Cory, Iacobucci and Major JJ concurring), in reaching the conclusion that the accused's silence could not be used as inculpatory evidence, relied not only on the right to remain silent but also on the right to be presumed innocent. He held that if silence is treated as evidence, the right to silence is violated as the accused has no choice but to furnish evidence, whether or not he or she elects to testify. Furthermore, the burden on the prosecution to prove guilt beyond a reasonable doubt prohibits the accused's silence from being used as evidence so as to meet the required standard of proof. Sopinka J reasoned as follows:

If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. Thus, in order for the burden of proof to remain with the Crown, as required by the Charter, the silence of the accused should not be used against him or her in building the case for guilt.¹⁹

39.2.9 However, as noted by Lamer CJC (dissenting), the drawing of an adverse inference only becomes a possibility once the prosecution has discharged its evidentiary burden of establishing a *prima facie* case; silence cannot be used to establish a *prima facie* case. Healy,²⁰

17 The following criticisms have been made regarding the approach adopted by Trengove *op cit* and reflected in **Lavehengwa** supra. 'This view is based on a presumption of guilt in that it disregards any other possible explanation for silence. Nor does it explain why the drawing of negative inferences from the exercise of a constitutionally conferred right, in the context of the interim Constitution, does not negate the existence of that right. Although it may be correct that no legislative enactment can prevent a jury which is not required to give reasons, from drawing an adverse inference, the same cannot be said in context of a non-jury system'. See Schwikkard P J **Presumption of Innocence** Kenwyn: Juta(1999) 120.

18 (1997) 1 SCR 874, 6 CR (5th) 1.

19 At 76.

20 P Healy 'Risk, Obligation and the Consequences of Silence at Trial' (1997) 2 **Canadian Criminal Law Review** 385.

defending Sopinka J's conclusion, argues that treating silence as an item of evidence places an obligation on the accused to adduce evidence. He states that this infringes the presumption of innocence, 'which protects the accused not only in disallowing the imposition of a legal burden on any exculpatory claim but by shielding him from the obligation to produce affirmative defence evidence'.

39.2.10 Although a consequence of the presumption of innocence is that the accused need not prove his or her innocence, logically the presumption of innocence cannot protect the accused from the risk of losing if he or she does not adduce sufficient evidence to raise a reasonable doubt in the face of a *prima facie* case. However, if an inference of guilt were an automatic consequence of silence, ie mandatory, the unreliability of such an inference would infringe the presumption of innocence as it would allow the possibility of conviction despite the existence of a reasonable doubt. Lamer CJC held that the accused's silence would not be a basis for drawing an inference whenever a *prima facie* case was established, and would only be permissible where the accused is enveloped in a cogent network of inculpatory facts.²¹

39.2.11 In the South African context this might be equated with only allowing the drawing of an adverse inference from circumstantial evidence where the inference to be drawn is consistent with all the proven facts and the proven facts are such that they exclude every reasonable inference save the one sought to be drawn.²² It is submitted that if the 'circumstantial evidence test' is applied, an inference from silence will not infringe the presumption of innocence. But this does not necessarily mean that the right to remain silent or the privilege against self-incrimination will not be infringed.

39.2.12 However, it can be argued that the rationale for the right to remain silent falls away once the prosecution has established a *prima facie* case. Lamer CJC expressed the rationale for the right to silence in the following terms:

21 At [50]. In **Trompert v Police** (1984) 1 CRNZ 324 the New Zealand Court of Appeal took a similar approach as that advocated by Lamer CJ. For a criticism of this case see C Cato 'Inferences and a Defendant's Right not to Testify' (1985) **New Zealand Law Journal** 216.

22 **R v Blom** 1939 AD 188; **R v De Villiers** 1944 AD 493; **S v Reddy** 1996 (2) SACR 1 (A).

[I]t is up to the state with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task. Once, however, the Crown discharges its obligation to present a *prima facie* case, such that it cannot be non-suited by a motion for a direct verdict of acquittal, the accused can legitimately be expected to respond, whether by testifying him- or herself or calling other evidence, and failure to do so may serve as the basis for drawing adverse inferences.²³

39.2.14 This approach may be criticised on the basis that the right to remain silent has an independent rationale other than a necessary reinforcement of the presumption of innocence. Although much has been written about the historical rationale for the right to remain silent and the privilege against self-incrimination,²⁴ the modern rationale would appear to have three facets: (1) concern for reliability (by deterring improper investigation) which relates directly to the truth-seeking function of the court; (2) a belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded; (3) the right to remain silent is necessary to give effect to the privilege against self-incrimination and the presumption of innocence.²⁵

39.2.15 It is difficult to predict whether the South African Constitutional Court would favour the approach of Lamer CJC or Sopinka J. However, it can be assumed that if a negative inference has any chance of passing constitutional muster the prosecution must have discharged its burden of proving a *prima facie* case and, furthermore, that a negative inference cannot be an automatic consequence of silence.

39.3 Submissions

39.3.1 This issue was not raised in Issue Paper 10 and no submissions were received by the Commission in this regard.

39.1 Evaluation and Recommendation

39.1.1 This issue is extensively argued in the South African Law Commission

23 At [29], quoting from **R v P (MB)** 1 SCR 555 at 579, 13 CR (4th) 302.

24 See for example Judge Nugent 'Self-incrimination in Perspective' 1999 **SALJ** 550.

25 See Schwikkard at p 122.

Discussion Paper 96. Consequently, the Commission makes no recommendation, in this Discussion Paper, on the accused's right to silence.

CHAPTER 40

VICTIM RIGHTS, THE TREATMENT OF VICTIMS AND WAYS TO INVOLVE VICTIMS IN THE PROCESS OF SENTENCING THE OFFENDER

40.1 Introduction

40.1.1 Demands made by victims and their families may be divided into two broad categories: claims for restitution and services and claims for procedural rights. Restitution involves calls for compensation in some form or the other. The call for services includes the need for counselling, therapy, support and treatment, information on the process of legal proceedings and the provision of facilities for complainants, victims, and their families, who are required to participate in legal proceedings or wish to observe them. The claim for procedural rights refers to the desire of victims to be part of and be acknowledged in the legal process.¹

40.1.2 The Chapter will therefore also consider ways to involve the victim more in the process of sentencing. In this regard the following possibilities will be considered:

Calling the victim as a witness to testify in court in order to prove either extenuating or mitigating circumstances;

Introducing >victim impact statements= for purposes of sentencing; and

Providing compensation and restitution to victims.

40.1.3 These possibilities are considered against the realisation that under the existing legal system the imposition of an appropriate sentence falls within the sole domain of the judicial officer and the fact that judicial officers regard impositions on their judicial discretion unfavourable.

40.2 The rights of victims

40.2.1 Introduction

1 This involves questions such as whether the victim should be given a say in the decision to prosecute, to grant bail, the role of the ancillary prosecutor, etc. These aspects are dealt with

40.2.1.1 In recent years victims of crime have raised questions about the lack of support, the absence of compensation and their diminished role in the criminal justice system. The criminal justice process appears to be predominantly oriented towards the offender and the victim is deemed relatively superfluous. From the moment that the decision is made to prosecute until the time that sentence is passed, the victim is an outsider to the process and has a limited role to play.²

40.2.1.2 During the group discussions on the Issue Paper³ some participants commented that the Constitution makes elaborate provision for the rights of accused persons, but provides very little on victim rights. In general, it was felt that victims are not sufficiently protected in the Constitution. The submissions to the Issue Paper on the question as to how the rights of victims of sexual abuse should be protected before, during and after the court process without compromising the rights of the offender, also bear evidence to this.⁴

40.3 **Current position**

40.3.1 Section 35 of the Constitution entrenches a plethora of rights accorded to arrested, detained and accused persons. The underlying reason is to protect individuals against arbitrary acts of the state where other constitutionally entrenched rights are limited, for example, the right to freedom of movement. In other words, where constitutionally entrenched rights are infringed, the manner in which this may be done is regulated. As the Bill of Rights relates primarily, but not exclusively, to the relationship between the state and its citizens, specific victims rights are not highlighted in the same fashion as >offenders= rights are. This state of affairs has led to the controversy under discussion.

40.3.2 The adoption of the Constitution of the Republic of South Africa Act 108 of 1996, was preceded by lengthy, arduous and protracted negotiation processes between the political role players involved. Advocates of victims rights, as did other groupings, tried their best to have special constitutional guarantees entrenched. Most, if not all, of these efforts failed. However, the call for the inclusion of victim=s rights in the Constitution has continued unabated.

elsewhere in this paper.

2 Nel & Bezuidenhout **Policing and Human Rights** 2nd Edition Juta 1997 at 155.

3 Although Issue Paper 10 had a particular **child** focus, most respondents did not limit their comments on this particular issue to the rights of child victims alone.

4 See paragraph 2.4.4 of Issue Paper 10.

Recently a political party⁵ has suggested that a Victims Charter be included in the Constitution to correct the imbalance of having specific rights for offenders and none for victims.

40.3.3 Victims rights refer to a variety of rights and services which victims of crime should be afforded, such as information regarding available financial and social services, notification of case status, protection from harassment and intimidation, separate court waiting rooms, the speedy return of property and being treated with compassion by criminal justice officials.⁶

40.3.4 The National Growth and Development Strategy (NGDS) signalled the beginning of a new focus on the plight of victims. The NGDS has its origins in the Reconstruction and Development Programme (RDP) and seeks to consolidate, sequence and monitor long-term strategies in government departments. The NGDS defines six pillars of enabling policies which will help government to prioritise those areas of activity which will raise the living standards of the majority of the population while at the same time promoting rapid growth. One of the six pillars is to ensure the safety and security of South Africans. The National Crime Prevention Strategy (NCPS) forms the core component within the NGDS pillar on Safety and Security and it is a medium- to long-term strategy to address the crime problem. Section 17 of the NCPS is devoted to a national programme for victim empowerment and support, and has as its main aim >the development of interventions and modifications in the criminal justice process which are aimed at the empowerment of victims=.⁷ Initiatives have sprouted throughout the country, but very few are sustained or are uniformly available. For example, >one stop= centres for victims of sexual offences have been started in certain areas but not others. In short, very limited services are presently available to victims and they have been accorded very few rights.

40.3.5 A soft approach does not seem to work. This has been proven by various lobbyists within the victims rights movement. Reporting⁸ on the combatting of violence against women, five years after South Africa pledged⁹ to fight violence against women in all its forms, the international organisation Human Rights Watch found that South Africa shows alarming

5 Democratic Party Policy Statement on **Restoring Justice to Victims of Crime**, at www.dp.org.za/archiveitem.asp?archiveitem+636 .

6 Naude CMB **An International Perspective on Victim Participation in the Criminal Justice Process with Specific Reference to Victim Impact Statements** Research report, Department of Criminology Pretoria: Unisa 1995.

7 Nel & Bezuidenhout **Policing and Human Rights** 1997(2nd edition) Juta: Cape Town.

8 WOZA 06 June 2000 **Background of violence against women** from Human Rights Watch.

9 In 1995, at the United Nations World Conference on Women in Beijing, China, 189 governments

rates of violence against women, violence that is fuelled all too often by the indifference of state officials and the failure to investigate and prosecute cases of violence seriously. They continued that >these countries¹⁰ provide important examples of how states have failed to meet their human rights obligations when it comes to fighting violence against women=.

40.3.6 The picture is not completely bleak though. Advances to the benefit of victims of crime have and are being made. The recently enacted **Domestic Violence Act**¹¹ has ensured that state officials can no longer act with indifference or impunity when dealing with intra-familial violence. The rights of domestic violence victims (which includes those victims who have been sexually abused) and the concomitant obligations placed on state officials by this Act, accord such victims the legislative protection which they desperately need.

40.3.7 The Project Committee on Sentencing has also recently released a discussion paper on sentencing.¹² The Sentencing Project Committee opines that improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down lie at the heart of a new partnership between the State and the public. The recommendations which are included in a draft Sentencing Bill aim to empower victims on a substantive as well as procedural level.

40.3.8 At a substantive level, explicit attention is given to restitution and compensation for victims of crime. Restitution and compensation are key elements of the comprehensive new sentence of community corrections, which also allows victims to benefit from other orders such as community service by the offender and victim-offender mediation. Sentences may also be suspended on condition of restitution or compensation for victims of crime. In every case where neither of these sentences is imposed, the court must consider whether a separate restitution or compensation order should be made.

40.3.9 The procedural innovations designed to benefit victims of crime include a requirement that prosecutors, when they intervene on sentence, must consider the interests of victims in every case. There is a provision for victim impact statements to be presented to the courts so that they may learn what impact the crime had in practice. Victims must be told when and how they may be involved in the eventual release of sentenced offenders from prison.

(including South Africa) pledged to fight violence against women in all its forms.

10 Referring to Jordan, Pakistan, Peru, Russia and South Africa.

11 Act 116 of 1998.

12 **Discussion Paper 91** Sentencing (A New Sentencing Framework).

These innovations are backed by detailed rules to ensure that victims are informed of their rights.

40.3.10 There are also provisions to ensure that the income of offenders is revealed so that they can be ordered to make reparation for their crimes in an appropriate way.

40.3.11 The Sentencing Project Committee has appointed a subcommittee to launch a separate and wider inquiry into a national compensation scheme for the victims of crime. Other wider issues that go beyond sentencing as they affect victims of crime at every stage of the criminal justice process are also receiving attention, such as a Victims= Charter.

40.3.12 The Department of Justice has embarked on an internal and inter-departmental consultation process in order to draft a Victims= Charter. This process is already at an advanced stage and discussions relating to the implementation strategy of the Charter are commencing shortly. The Victims= Charter will accord victims of crime certain >victims= rights= in order to empower them on their journey through the criminal justice system. The status of the Charter will very much influence the manner in which the rights contained in it are to be implemented or protected. The status of the Charter still has to be determined.

40.3.13 Although political parties have been calling on government to implement proposals in this regard, legislative reforms needed to implement a Victims= Rights Charter and a fund for victims of violent crime have unsuccessfully been put to Parliament as private member=s Bills in 1995, 1996 and 1997.¹³

40.4 **Comparative measures relating to victim rights**

40.4.1 The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34), adopted on 29 November 1985, is an important statement of principles agreed to by the international community containing basic victims= rights such as access to justice and fair treatment, restitution and compensation. It reflects the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders and the rights and interests of victims. The Declaration is based on the philosophy that victims should be adequately recognised and treated with respect for their dignity. Victims are entitled to access the mechanisms of justice and prompt redress for

13 The 1997 Bill was introduced by Mr D H M Gibson, MP.

the harm and loss suffered. They are also entitled to receive adequate specialised assistance in dealing with emotional trauma and other problems caused by the impact of victimisation.¹⁴ A Declaration by nature identifies, recognises and affirms rights which already exist, or should exist and does not confer or bestow rights. Each signatory of this Declaration (which includes South Africa) is obliged to enact or amend legislation or policy in order to apply these principles and thereby realise the rights contained in them.

40.4.2 Governments and organisations around the world have responded to the challenge of implementation of the Declaration in different ways. Some countries have made real progress, but others have only just started to recognise the need to make their justice and support systems more accessible for victims.

40.4.3 On 22 February 1990, European Victims= Day, the British government published the first Victims= Charter: a statement of the rights of victims of crime (Home Office, 1990). The Charter lists the responsibilities to be met by the various professions in the criminal justice process.¹⁵ The Charter further sets out to explain to victims of crime what happens after the offence has been reported to the police and the kind of service victims of crime should expect. The Charter provides for a complaints (and recognition of excellent public service) mechanism, monitoring of the standards set, and asks how the agencies who make up the criminal justice system should improve the treatment of victims. The Charter is continuously updated.

40.4.4 In 1982 the *Canadian Association quebecoise Plaidoyer-Victimes* was created to promote and defend the rights and interests of crime victims. The Association has been the source of numerous initiatives, including the implementation of the Victim Impact Statement in the judicial district of Montreal. It has made significant contributions to the improvement in the treatment received by victims in the criminal justice system as well as the services they are offered. Victims of crime are specifically catered for by the **Canadian Act Respecting Victims of Crime, 1995**. This Act *inter alia* defines a victim as a person who, as a result of crime, suffers emotional or physical harm, loss of or damage to property or economic harm. If the crime results in the person=s death, the victims include the immediate family and dependants of the primary victim, unless they are charged with committing the offence.

14 **Manual on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power** Commission on Crime Prevention and Criminal Justice The Hague 6 March 1997.

15 **The rights of victims of crime** A policy paper by Victim Support 1995.

40.4.5 The Council of Europe's Convention on State Compensation to Victims of Violent Crime of 1983 also makes recommendations on the role of the victim in criminal law and the criminal process, on assistance to victims and on crime prevention.

40.5 **Victims' rights: Options for reform**

40.5.1 Considerable attention has deservedly been paid to ensuring due process for the >offender= who is threatened with State-imposed punishment, and who should, therefore, be afforded all possibilities of establishing his or her innocence, and/or presenting other considerations in his or her defence. Hence the constitutionally guaranteed rights given to arrested, detained and accused persons.

40.5.2 However similar attention has not been paid to the victim. Traditionally the State was assumed to be representing the best interests of the victim, and there was not seen to be need for direct victim involvement in the proceedings. Unfortunately the best interests of the victim are not always served, resulting in many victims having to face insensitive treatment by the police, prosecutors and court officials. This applies particularly to certain especially vulnerable categories of victims, such as victims of sexual offences. Even if the offender is apprehended and brought to trial, the experience of victims in many instances seems to be that they have been marginalised and that they do not have the opportunity to express their view and concerns in the criminal process. Many systems do not allow the victim to present his or her civil claim in connection with criminal proceedings.¹⁶ Even if the offender is convicted, the sanctions (often a fine or imprisonment) have little relevance to the victim, other than the satisfaction of seeing the offender punished.

40.5.3 The need to give victims their rightful place in our legal system and to increase the amount and quality of assistance available to victims and specifically victims of sexual offences is apparent. The manner in which this should be done is not.

40.5.4 The victim movement consists of various interest groups who each have different goals that they would like to achieve. One group may focus on caring for victims and believe that reforms are needed to enable the community to assist the victim in recovery. A second emphasises the rehabilitation of the offender and is geared towards restitution and mediation. A

16 Adams A **Draft International Victim Assistance Handbook** On the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Washington 1997.

third group may call for harsher punishment of the offender to bring it in line with the harm originally caused to the victim. A fourth group calls for strengthening the procedural position of the victim and changing the criminal justice system completely. The last category of interest groups emphasises crime prevention and aims to find out why a crime has been committed and to eliminate contributing factors. This divergence of opinion is compounded by the fact that different victims have different expectations, hopes and concerns.¹⁷

40.5.5 In calling for victims rights, some victims= lobbies are confronting laws (including the Constitution) - or the absence of laws - which make it difficult and in some cases dangerous for them to pursue justice when they have been the victims of sexual offences. The mandate of this investigation limits its influence to the strengthening of the procedural position of the victim and more specifically the sexual offence victim. In meeting this mandate and as far as victims= rights are concerned, the following options present themselves. It must be emphasised, however, that these options are not mutually exclusive.¹⁸

- (1) Amend the Constitution to include a section on victims= rights. It is proposed that these rights be included not in order merely to balance the rights given to the >offender= but rather in order to enshrine an uncompromising commitment to the empowerment of victims. As constitutionally entrenched victims= rights would have to cast its net over all victims and not just those of sexual offences, it is recommended that if this option is preferred the >victims= rights= subcommittee of the Project Committee on Sentencing would be the correct vehicle to make proposals in this regard. Including victims= rights in the Constitution would give these rights the added protection that they may only be limited in accordance with the limitation clause.¹⁹
- (2) Adopt specific legislation on the rights of victims of crime as was done in Canada. By providing for victims= rights in a separate Act, the same objective as including rights in the Constitution would hopefully be achieved, i.e. fostering an inherent respect for victims rights.
- (3) Similarly rights of victims of sexual offences could be incorporated into specific sexual offence legislation. Sanctions for non-compliance in the same fashion as the Domestic

17 Nel & Bezuidenhout at 163.

18 See further Chapter 2 - The Underlying Principles for the Management of Sexual Offences, Protocols and Codes of Good Practice, and Case Management.

19 Section 36 of the Constitution.

Violence Act would give uncooperative officials the necessary motivation to comply. One of the benefits of this option is that, as needs and circumstances change, amendments could be made to the Act without the complicated procedures which precipitate a constitutional amendment.

- (4) Adopt a Victims= Charter as was done in the United Kingdom. Such a Charter could be regularly updated without the procedures involved in amending legislation. A Charter would be able to address wider concerns relating to victims of crime and would be able to tabulate the responsibilities of the different professions, including non-governmental organisations. However the status and enforceability of such a Charter is unsure.
- (5) Review all aspects of criminal procedure regarding victims so that legislation appropriate to victims rights can be incorporated in general criminal procedure. This option would weave victims= rights into the heart of criminal procedure. Once again if this option is chosen, it is recommended that the >victims rights= subcommittee of the Project Committee on Sentencing would be the correct vehicle to make proposals in this regard.

40.5.6 The above options are not necessarily mutually exclusive. Further, it must be remembered that other developments in regard to sexual offences and victimology in general will impact on sexual offence victims.²⁰ In addition to the recognition of victims rights, albeit general or specific, the accommodation of victims of crime in the criminal justice system will require hard policy decisions, commitments, resources and training from relevant government departments, without which these rights remain meaningless. Comment is invited on which option would be the most appropriate mechanism to entrench the rights of victims of sexual offences.

40.6 The treatment of victims

40.6.1 In response to the questions in the Issue Paper²¹ whether treatment and counselling should be offered to the victim alone or whether it should be extended to the victim's family and who should bear the cost of the counselling and treatment, the majority of submissions supported the idea that counselling should be extended to the victim's family²²

²⁰ For example, see Chapter 2 above **The Underlying Principles for the Management of Sexual Offences, Protocols and Codes of Good Practice, and Case Management.**

²¹ See par. 5.10.1 of the Issue Paper.

²² **Dpt. Health and Welfare, Mpumalanga; Dpt. Welfare and Population Development, Gauteng;**

unless the offender is a family member²³ and that the offender should bear the costs.²⁴ If the offender could not pay, funds for counselling should be obtained from the State²⁵ or a victim compensation fund²⁶ to which all offenders who have an income should contribute.²⁷

40.6.2 However, some questions remain. Should treatment and counselling, for instance, be offered to the victim alone or should it be extended to the victim's family? What about medical services? Should the term >victim= include only direct victims (the person who was directly prejudiced by the commission of the crime), or should it also include indirect victims (persons who were not directly involved in the crime, but who were directly prejudiced as a result thereof, for example the family of a victim)? Who should bear the cost of the counselling and treatment or medical services? Should a victim compensation fund be established to finance counselling and treatment of victims of sexual abuse?

40.7 Submissions

40.7.1 The **Office of the Unit Commander, CPU, East Rand**²⁸ argues for the victim to be given the opportunity to address the court after the conviction of the accused but just before sentencing. **Ms W L Clark**, senior public prosecutor, Verulam points out that while no specific provision is made to allow the victim to address the court on sentencing, there is nothing to preclude the prosecution from calling the victim in aggravation of sentence. However, she is not in favour of the victim playing too great a role in decision-making. She continues:

South African National Council for Child and Family Welfare (38 responses); Child and Family Welfare Society Bloemfontein; Council for Child and Family Welfare KwaZulu Natal; SAPS KwaZulu Natal; Sr Potter Agape C.P. School; Vryheid Child and Family Welfare Society; Association for Persons with Physical Disabilities, Northern Cape; Attorney-General Transvaal.

²³ Tshwaranang Legal Advocacy Centre.

²⁴ **Association for Persons with Physical Disabilities, Northern Cape; Attorney-General Transvaal; Dpt. Welfare and Population Development Gauteng; SA National Council for Child and Family Welfare; Johannesburg Child Welfare Society; SAPS KwaZulu Natal; Ms W L Clark.**

²⁵ **Vryheid Child and Family Welfare Society.**

²⁶ **Dpt. Welfare and Population Development Gauteng; South African National Council for Child and Family Welfare (36/39 responses); Child and Family Welfare Society Bloemfontein; SAPS KwaZulu Natal; Tshwaranang Legal Advocacy Child and Family Centre; Attorney General Transvaal; Association for Persons with Physical Disabilities, Northern Cape.**

²⁷ **Johannesburg Child Welfare Society.**

Often he or she (the victim) is ill-equipped to make an informed decision; the prosecution has the requisite training. In many cases the Attorney-General decides, and in terms of an Attorney-General circular all cases in KwaZulu Natal must be referred to the Attorney-General's office as apparently even ordinary prosecutors are deemed to lack the insight. It is patently absurd then to allow a pre-schooler to dictate terms!

All the same the victim should be allowed to make a comment and this comment could be one of the factors that is ultimately borne in mind after being weighed against all other factors.

40.7.2 **Dr J A van S D=Oliveira SC**, the then Attorney-General: Transvaal says that the impact of the offence on the victim is always a relevant consideration at the sentencing stage and the victim's evidence in this regard is usually already on record, having testified on the merits. He also points out that the views of experts are also relevant and in many instances such evidence, if available, is put on record by the prosecution in aggravation of sentence.

40.7.3 As regards the decision to prosecute, the **Johannesburg Child Welfare Society** points out that while it is important to hear the views of victims, it should at the same time be borne in mind that the child in a sexual abuse case has already been given the burden of roles which are beyond his or her maturity; also that such victim will be under heavy internal and possibly external pressure to recant. The **Society** therefore feels that the decision to prosecute must be taken by the authorities involved and that there should >also be regulations in terms of which prosecution is automatic in some categories of offence, and proceeds whether or not the complainant withdraws charges. The **Society** says the present practice by some CPU officers of refusing to take a statement from a child and / or to press charges without the permission of the parent (e.g. the mother in an incest case) is unacceptable.

40.7.4 On the other hand, the **Department of Justice**²⁹ argues that the victim should be at liberty >to decide whether to prosecute or not ... the victim must be involved in the decision making process regarding the case. It may also be necessary to involve the community=.

40.7.5 In the combined submission from the **SAPS Child Protection Units in KwaZulu Natal** it is recommended that treatment should be extended to the whole family. They further argue that victims should only be granted a role in the decision-making, e.g. the decision to prosecute, in cases of intra-familial abuse and where there is a clear indication that the offender is going to plead guilty.

28 Submission prepared by **Mr T M Tshabalala**.

29 Submission prepared by **Ms Thuli Madonsela**.

40.7.6 **Tshwaranang Legal Advocacy Centre** says counselling should be offered to victims and their families, unless the abuser is a member of the family. It is assumed that this means that only the abuser is excluded from receiving treatment or counselling and that the victim and his or her family, even in cases of intra-familial abuse, will be entitled to it. **Tshwaranang** further says that the team assigned to the case should prepare recommendations as to how the life of the victim has been affected and these should be used as policy guidelines by the presiding officer. It says:

The victim=s views should always be canvassed, perhaps in the form of an affidavit to the judge. This will serve an important process value, which is to ensure that the victim is not left feeling silenced by the system. Whether or not the victim=s views are finally incorporated should be left to the discretion of the judicial officer.

40.7.7 The submission by the **S A National Council for Child and Family Welfare** also indicates strong support for extending treatment and counselling services to the family of the victim.³⁰ The **S A National Council** submission also indicates that 15 respondents believe the offender should bear the cost of counselling the victim and the family of the victim; if the offender cannot afford it, then the state should provide these services free of charge;³¹ alternatively the family of the victim should bear the cost or the services must be financed by a victim=s compensation fund.

40.7.8 The **National Council of Women of South Africa** points out that victims injured in assaults are not automatically eligible for free medical and psychological treatment. As a result, many victims are faced with high medical bills, while the perpetrator enjoys medical treatment at State expense. The **Council** therefore calls for state assistance to cover the medical and psychological treatment of victims. These sentiments are shared by **Mr P Nel**, a public prosecutor in Port Elizabeth, who says:

After a criminal has been found guilty and sentenced the victim and his or her family may still be left with the medical bills to pay. Although civil remedies may be available to the victim to pay for medical costs, legal costs in order to recover these expenses may often outstrip the benefit sought. It is suggested that in order to meet the costs incurred

30 Four respondents were of the opinion that treatment and counselling should be offered to the victim alone while 38 respondents were in favour of extending such services to the family of the victim. See also the submission of the **Association for Persons with Physical Disabilities, Northern Cape** who argues that treatment should be extended to the family of the victim so that the family can gain insight on what the victim went through and work through their own feelings.

31 This is also the view of the **Forensic Social Workers** in the S A Police Service.

in order to pay for the therapy and or other medical expenses, an automatic claim be available to the victim against the convicted person.

40.7.9 However, on a practical level it is important to note that treatment and counselling for victims are but an ideal. This is put very forcefully by **Ms M E E Willemse**, then acting regional court magistrate, Benoni who said:

Psychological help and support for complainants do not exist and the position is that victims in the cases seldom if ever receive psychological treatment.³²

40.7.10 The establishment of a victim compensation fund to finance the counselling and treatment of victims of sexual abuse received overwhelming support.³³ One submission on victim compensation stands out - that of **Mr Neil van Dokkum**. He says:

Two problems present themselves. The first is being able to accept, and convince a client to accept, that the seemingly unquantifiable damage inflicted on a child victim of assault, particularly sexual assault, can be measured in monetary terms. Secondly, and this problem is worst than the first, to convince yourself and then your client that it is worthwhile subjecting the child, for monetary reward, to a repeat of the horrors that the child previously endured. These are questions that practitioners must resolve within themselves before counselling their clients.

Our law operates on the premise that damages can be assessed in respect of emotional and physical suffering. Judges often comment on the difficulty of assessing such damage in monetary terms but they nevertheless make awards in such matters. It therefore follows that rather than try and second guess the court into deciding what is an appropriate amount, lawyers simply rely on precedent. In other words, a lawyer will attempt to track down a reported case where the facts are similar to the case before him or her, and will award a similar amount on similar facts, allowing for inflation.

The only reported South African case which might be used as an appropriate guideline is **N v T** 1994 (1) SA 862 (C), where an eight-year-old girl was raped by the defendant. The mother of the child was awarded R 10 000.00 as damages for emotional suffering, and the victim herself was awarded R 30 000.00 as damages for the physical and emotional suffering caused by the attack.

The second problem is more difficult. Is any amount of money worth having to relive the experience all over again? Even in instances where the defendant has already been

32 Our translation.

33 See, for instance, the submissions by the **Western Cape Street Child Forum**; **Ms C Wagner** of the Gauteng Department of Welfare and Population Development; **Tshwaranang Legal Advocacy Centre**; **S A National Council for Child and Family Welfare** (36 in favour, 3 against, 3 no response); the **Office of the SAPS Provincial Commissioner, Western Cape**; **Association for Persons with Physical Disabilities, Northern Cape**; **Ms W L Clark**, senior public prosecutor, Verulam; the (national) **Department of Education**; the **Department of Justice**; **Johannesburg Child Welfare Society**.

found guilty in a criminal trial, and even in an instance where the defendant does not defend the action (as happened in the abovementioned case) the victim will have to enter the witness box again and tell the court about the attack. The dangers of secondary victimisation and secondary traumatisation are very real.

It is a rule of law that even in instances where the accused person has been found guilty in a criminal court of the offence charged, it is not possible in a civil trial concerning damages for the victim of that crime to simply hand in the record of the criminal trial as evidence of what the defendant did to the plaintiff. It is necessary for that civil court to rehear that evidence in its entirety. This is as a result of a fairly controversial principle in our law which says that opinion evidence must be excluded as inadmissible evidence (unless of course you are an expert witness qualified to give opinions on a matter within your realm of expertise). According to this rule it therefore follows that evidence of a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence for which he was convicted, as the finding of the criminal court is merely an *opinion* of that court and another court faced with the same facts might come to a different conclusion.

Therefore in a civil trial the victim of the attack will have to repeat her testimony, even in instances where the attacker has been convicted and also in instances where the defendant (i.e. the attacker) does not defend the action.

The rule that a criminal conviction cannot be led as evidence in a civil trial was as a result of an English case, **Hollington v F Hewthorn & Co Ltd** [1940] KB 587; [1940] 2 All ER 35, which has subsequently been abolished in England by the Civil Evidence Act 1968. Section 11(1) of that Act provides that:

In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom ... shall ... be admissible in evidence for the purposes of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings ...@.

Section 11(2) of the Act gives the conviction presumptive effect by holding that :

A(he is) taken to have committed that offence unless the contrary is proved@. In other words it would still be open for the defendant to lead evidence that the conviction was wrong, but until it is rebutted, the fact of the conviction is *prima facie* proof that the defendant did commit the offence as charged. Therefore, in instances where the defendant does not defend the proceedings, and in cases of child abuse this is likely to be a frequent occurrence, the details of the conviction could be led as *prima facie* evidence that the defendant did commit the crime as charged. As this evidence would not be subsequently challenged, it would carry the day.

40.7.11 One cannot but agree with **Mr Van Dokkum** that it is rather bizarre that the South African law is governed by a principle derived from an English decision which the English have themselves recognised as wrong and overturned by statute. **The Project Committee on Sexual Offences therefore support the contention by Mr Van Dokkum that the legislature should pass an enactment similar to the English Civil Evidence Act 1968.** This could

probably entail a relatively minor amendment to our current **Civil Proceedings Evidence Act 25 of 1965**, and could be achieved with a minimum of legislative tinkering. The benefits however could be enormous, particularly in this area of damages for offences against women and children, as at the moment the claim for damages is at the expense of the healing process, rather than being part of it.

40.8 Defining a victim

40.8.1 The questions posed above³⁴ cannot be adequately answered if the term victim is not defined. At its narrowest, the *victim* of an offence is the person against whom the offence was committed and who suffers injury as a result of the offence. More broadly, *victim* is expanded to include a person who was a witness to the act of actual or threatened violence and who has suffered, or is likely to suffer, injury as a result of the offence; or to include a person who suffers injury in the course of assisting a police officer in the exercise of the officer's power to arrest the accused person or to take action to prevent the commission of an offence of which the person is accused. Most expansively, *victim* includes any person who suffers loss or harm as a result of a criminal offence even where that offence was not committed directly against him or her; or at least any person who is a member of the immediate family or a dependant of the direct victim. This is particularly important in cases where the offence results in death.³⁵

40.8.2 The crime victims' movement has focussed most attention on the needs of victims of violent crime. In these cases, terminology has expanded beyond *primary crime victims* to include *secondary crime victims* who also experience the harm first hand, such as intimate partners or significant others of rape victims or children of a battered woman (National Victim Assistance Academy).

40.8.3 According to the South African Law Commission's **Issue Paper 7** on Sentencing and Restorative Justice victims are persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws. The term therefore includes direct victims (the person who was directly prejudiced by the

34 See paragraph 40.6 above.

35 Sentencing UN Declaration para 2; **Acts Revision (Victims of Crime) Act 1994 (ACT)** s 4 ("victim" (b)); **Victims of Crimes Act 1994 (ACT)** s 3 ("victim" (b)); **Sentencing Act 1995 (WA)** s 13(b); **Victims of Offences Act 1987 (NZ)** s 2. See also New South Wales, Charter of Victims' Rights ("Who is a victim?"); **Sentencing Legislation (Amendment) Bill 1994 (NSW)** Sch 3 s 447C(2)A. (Victim Impact Statement) Act 1994 (Vic) s 1.

commission of the crime) as well as indirect victims (persons who were not directly involved in the crime, but who were directly prejudiced as a result thereof, for example the family of a victim).³⁶

40.8.4 It should also be noted that some people who have been harmed by crime feel that defining themselves as a *victim* has negative connotations, and choose instead to define themselves as a *survivor*. This is a very personal choice that can *only* be made by the person victimised, and not by any other individual.

40.8.5 The emergence of the crime victims' rights movement has influenced the field of victimology, the nature of the research and the treatment of the victim by the criminal justice system. Victims of crime have generally been treated less than adequately within the criminal justice system. Until the beginning of the 1970s, all the attention of criminologists and the public was fixed on the offender. Offenders were provided with lawyers, medical care, recreational opportunities, schooling, job training and psychological counselling. Victims were, at best, the forgotten characters in the crime saga, and, at worst, they were victimised twice, first by the offender and then by the criminal justice system.³⁷

40.8.6 Since the 1980s, official inquiries have specifically considered the role of victims in the criminal justice system in many jurisdictions, including the USA, Canada, South Australia, New South Wales, Victoria, Tasmania and the Australian Capital Territory. The role of victims in sentencing has also been considered in the course of sentencing inquiries. The activities of the 1980s have had practical results in two broad respects. First, recognition has been accorded to victims' needs for consideration and special services. Secondly, but less extensively, victims have been given procedural rights in the criminal justice system, including rights to the point of sentencing.³⁸

40.8.7 In South Africa awareness of the needs of crime victims as well as services for them are found to compare unfavourably with developments elsewhere in the world where internationally services for victims of crime and violence have been taken up on a national level

³⁶ This is essential in the case of children since a study on the patterns of crimes against children officially reported to the CPU showed that in a quarter (25,5%) of the cases the act took place **in the presence of other children** such as brothers/sisters, friends or playmates. It could thus be surmised that the psychological damage to child victims was thus not limited to the victim alone but also affected children who were present and who witnessed the deed.

³⁷ <http://www.ojp.usdoj.gov/ovc/assist/nvaa/ch06cjs.htm> .

³⁸ See the South African Law Commission **Issue Paper 7** on Sentencing and Restorative Justice.

by organisations offering a variety of emotional and practical services. Currently, apart from programmes for victims of sexual abuse, victim empowerment programmes are in their infancy. In South Africa a national body, The Victim Empowerment Programme, was established in 1996. This team aims to co-ordinate, set standards and monitor service delivery on a national level. The aim is to duplicate this structure in every province and on local level.

40.8.8 Recent thinking around victim empowerment in South Africa is embodied in the draft position paper: Putting Victims on the Agenda, the White Paper on Safety and Security of 1998 and the National Crime Prevention Strategy, released in May 1996. These policy papers promote a victim-centred restorative justice process aimed at repairing the harm done to victims and the community through negotiation, mediation, victim empowerment and reparation.

40.8.9 The principles according to which victims of violent crimes are compensated are recognised in most European countries, as well as in the USA and Canada. South Africa is not only far behind the rest of the world in respect of victim support in general but of victim compensation in particular. The South African Law Commission's Project Committee on Sentencing and Restorative Justice already concluded in 1997 that the introduction of a central compensation scheme for victims of crime in South Africa was a matter of urgency.³⁹ Nothing further has, however, been done in this regard since then. Such a scheme could help to restore public confidence in the criminal justice system.

40.9 **The current legal position in South Africa**⁴⁰

40.9.1 South Africa is at present undergoing changes and major reforms are being considered. Despite the establishment of the National Victim Empowerment Committee and the fact that South Africa is a signatory to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, reparation to the victims of crime in South Africa is inadequate and limited services are at present being provided to victims of crime.

40.9.2 Most victims services developed since the 1990's when various welfare organisations and non-government institutions established victim support services such as rape crisis units, family and child abuse services, child line centres and refuges for victims of

³⁹ For a more complete description and recommendations regarding victim compensation see Issue Paper 7 of the South African Law Commission.

⁴⁰ This section is derived from the South African Law Commission's **Issue Paper 7** on Sentencing and Restorative Justice

domestic violence. In the 1980s services were extended to victims of violence such as terrorism and robbery. The police also established child protection units. It is, however, clear that at present there is a strong movement towards the establishment of a co-ordinated victim support service, but it will take some time before results would be visible.

40.9.3 In terms of section 3(d) of the **Probation Services Act** 116 of 1991 the Minister may establish programmes aimed at the care and treatment of victims of crime. Provision is also made for programmes aimed at prevention of crime,⁴¹ information to and treatment of offenders and other persons,⁴² the observation, treatment and supervision of persons released from prison,⁴³ the establishment, financing and registration of shelters⁴⁴ and the compensation of victims of crime.

40.9.4 There is currently no State Compensation Fund to assist victims of crime although a State President's Fund for Victims of Terrorism was established on 20 May 1983.

40.9.5 In theory victims can also institute private criminal proceedings against the offender if the Attorney-General declines to prosecute, but this is very seldom used in South Africa as most victims are not aware of this right and very few have the resources or legal knowledge to pursue such action.

40.9.6 The **Promotion of National Unity and Reconciliation Act** 34 of 1995 represents steps already taken to give greater recognition to victims of crime. The Act affords victims an opportunity to relate the violations they suffered and provides for measures aimed at the granting of reparation to, and the rehabilitation and restoration of the human and civil dignity of victims of violations of human rights.

40.9.7 Section 300 of the **Criminal Procedure Act** 51 of 1977 makes provision for the payment of compensation to victims of crime at the request of the prosecutor. Claims for damage or loss are limited to damage or loss of property and, in order to determine the amount of compensation, the court may refer to the evidence and the proceedings at the trial or hear further evidence.

41 Section 3(a) of the **Probation Services Act**, 1991.

42 Section 3(c) of the **Probation Services Act**, 1991.

43 Section 3(e) of the **Probation Services Act**, 1991.

40.9.8 The **Criminal Procedure Act**, however, does not make provision for compensation to victims for injuries sustained as a result of crime nor for the payment of compensation to the family if the victim was killed. Orders for compensation will furthermore not be considered unless the complainant requests the public prosecutor to apply to the court for an order and complainants seldom make use of the provisions because they are either not present or they are unaware of the provisions of the Act.

40.9.9 The South African Law Commission's project on Sentencing have recommended the enactment of a new section in their proposed Bill⁴⁵ which makes provision for a sentence of reparation that may be imposed for any offence and which a court must consider in every case. The offender may be ordered to make appropriate reparation in the form of restitution and compensation to any victim of an offence for -

- (1) damage to or loss or destruction of property, including money;
- (2) physical, psychological or other injury; or
- (3) loss of income or support.⁴⁶

40.10 **Evaluation and recommendation**

40.10.1 A first step towards resolving this unsatisfactory situation within a restorative justice framework, would be to ensure that treatment and counselling should not only be offered to the victim alone but should include the victim's family. Furthermore the definition of *victim* should not only include *direct* and *indirect victims* such as family, but be extended to include the following:

- A person who has suffered direct, or threatened, physical, emotional or pecuniary harm as a result of the commission of a crime, including, in the case of a victim who is under 18 years of age, or incompetent, or incapacitated, or deceased, or one of the following: a spouse; a legal guardian; a parent; a child; a sibling; another family member; or another person designated by the court; and in the case of a victim that is an institutional entity, or an authorised representative of the entity, that entity.

44 Section 3(g) of the **Probation Services Act**, 1991.

45 South African Law Commission **Report** >Sentencing: (A new Sentencing Framework) Project 82 November 2000 at p 75 -76 and 126. The proposed Bill has not been enacted at date of publication hereof.

46 Clause 37(2).

- A State Compensation Fund to assist victims of crime similar to the State President's Fund for Victims of Terrorism should be established. Such a fund should also make provision for travel expenses and the financing of counselling and treatment costs of victims of sexual offences. No means test for victims should apply. All offenders and perhaps society in general should contribute to this fund in one way or another. The offender therefore does not pay for the treatment or counselling of the victims of his or her crime, but for the treatment and counselling of victims in general through the State Victim Compensation Fund.
- If treatment and counselling of the victim were to be limited to affordability for the offender, very few victims would ever receive treatment and / or counselling. The Commission also views it as secondary traumatisation if a victim has to look to the person who has offended against him or her for funds for treatment and counselling.

40.10.1.1 The duty of the State to protect persons and to be responsible for their failure to do so is currently argued in our courts. Alix Carmichele, the applicant, sued the Ministers of Justice and Safety and Security for damages resulting from an attack on her by a certain Coetzee. At the time of the attack, Coetzee had been released without bail and was awaiting trial for a previous attack on and attempted rape of another woman. Alix Carmichele based her case on the alleged omissions of the police and prosecutor and their duties imposed by section 215 of the Interim Constitution, and on the State under the constitutional rights to life, equality, dignity, freedom and security of the person and privacy. The High Court dismissed the applicant's claim finding that she had not shown that the police or prosecutor had wrongfully failed to fulfil a legal duty. She appealed to the Supreme Court of Appeal, which held that the police and prosecution had no legal duty of care towards the applicant and that in the absence of a special relationship between them and the applicant, they could not be held liable for damages to her.⁴⁷

40.10.1.2 Alix Carmichele then took the case to the Constitutional Court which held in a unanimous decision, granted the appeal. The Constitutional Court considered the potential liability of both the police and prosecutors. As to the police it held that the State is obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. In the particular circumstances of the case the

47 <http://www.concourt.gov.za/hearings/2001/carmichelehearing.shtml>.

police=s recommendation for the assailant=s release could therefore amount to wrongful conduct giving rise to liability for the consequences. The Court similarly held that prosecutors are under a duty to place all information before the court relevant to the refusal or granting of bail and might reasonably be held liable for negligently failing to fulfil that duty.⁴⁸

40.10.1.3 As a result the case of Carmichele has now been referred back to the High Court. The case has been re-opened on the basis that Carmichele has made out a case for the Ministers to meet. The latter will now have the opportunity to lead evidence as to whether they should be held liable on the facts of the particular case.

40.10.2 The Canadian legislation defines the term >victim=, for purposes of victim impact statements, as broader than the conventional understanding of the term victim. In **Issue Paper 7** the Project Committee on Sentencing also suggests that the term >victim= should be defined broadly as >the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence=.⁴⁹ However, the Commission did not define the concept >victim= in Discussion Paper 91 or in the Sentencing Framework Bill, as the Project Committee on Sentencing plans to do so in a discussion paper on a compensation fund for victims of crime which is currently being prepared.

40.10.3 **Pending finalisation of the discussion paper on a compensation fund for victims of crime by the Project Committee on Sentencing,⁵⁰ the Project Committee on Sexual Offences would like to recommend to the Sentencing Committee to include a definition of >victim= in the Compensation Fund for Victims of Crime Bill. We would also like to argue for an extension of the notion of >victim= in such a Bill. We also believe that it is essential to define >harm= in order to reflect the wide-ranging consequences of an act of sexual violence adequately.** The Australian provisions, while limited, are useful in this regard, and should be expanded for purposes of South African legislation.

40.10.4 **The Project Committee on Sexual Offences accordingly proposes the following definition of >victim= for inclusion in the Compensation Fund for Victims of Crime Bill:**

48 <http://www.concourt.gov.za/cases/2001/carmichelesum.shtml>

49 South African Law Commission **Issue Paper 7** (Project 82) par 4.7.

50 The workshopping process on this Discussion Paper is due to commence at the end of October

- (1) For the purposes of this section, a victim includes,
- (a) any person who directly or indirectly suffered harm or loss as a result of the commission of a sexual offence;
 - (b) where such person has died, is ill or otherwise incapable of making a statement,
 - (i) the spouse or relative of that person;
 - (ii) anyone who has in law or in fact custody of that person or is responsible for the care or support of that person;
 - (iii) any dependant of that person.
- § (c) a witness to the act or threatened act of a sexual offence who has suffered direct or indirect harm or loss as a result of the commission of a sexual offence.

>Harm or loss= includes physical injury; mental injury or emotional suffering; pregnancy; sustaining HIV/AIDS or any other sexually transmitted disease; economic loss; and a substantial impairment of a right accorded by law.

40.11 **Calling the victim as a witness to testify at sentencing**

40.11.1 After proof of previous convictions, or after the court has been informed that the accused has no previous convictions, the court may in terms of section 274(1) of the Criminal Procedure Act 51 of 1977 hear such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The court may itself call witnesses to give evidence regarding sentence or may allow the prosecution or the defence to lead evidence. One such witness which may be called to adduce evidence on sentence is the victim.

40.11.2 While it is strictly speaking ideal for facts in mitigation or aggravation of sentence to be placed before the court by presenting the evidence of a witness under oath,⁵¹ such facts

2001.

51 See, for instance, **S v Gough** 1980 (3) SA 785 (NC); **S v N** 1964 (4) SA 336 (C); **S v Van**

may also be placed before the court by handing in sworn statements, without the witness testifying in court, or by means of an address to the court by the representatives for the prosecution and defence respectively.⁵² Information conveyed in the latter form will not weigh more than mere argument, unless the other party admits to it. If the other party does agree to the admission of such statements, they will carry the same weight with the court as accepted evidence under oath.⁵³

40.11.3 Despite the general rule that the rules of evidence applying to the merits of the case will also apply to sentencing proceedings, a somewhat more liberal attitude is adopted as far as evidence on sentence is concerned.⁵⁴ This does not imply that all the rules of evidence are to be ignored during the stage of sentencing, but that in suitable cases, a strict and technical application of these rules should not be adhered to, since this may result in the exclusion of information which is relevant and helpful in deciding on a suitable sentence. The hearsay rule, for example, may occasionally be relaxed for purposes of sentence proceedings.⁵⁵

40.11.4 The Project Committee on Sentencing is considering introducing a provision similar in scope to section 274(1) of the Criminal Procedure Act 51 of 1977 in the draft Sentencing Bill.⁵⁶ **In the light of the recommendations made by this Project Committee we do not recommend any changes to section 274(1) of the Criminal Procedure Act 51 of 1977.** However, the Sentencing Project Committee also propose to include a provision on the evidence relating to the interests of victims in the draft Sentencing Bill.⁵⁷ For the benefit of the reader, and as this clause also relates to victim impact statements, we quote the relevant section in full:

40.11.5 **46. Evidence relating to the interests of victims**

- (1) The prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of the victim and the impact of the crime on the victim and, where practicable, furnish the court with particulars of -

Rensburg 1968 (2) SA 622 (T).

52 See generally Etienne du Toit et al **Commentary on the Criminal Procedure Act** (1993) 28.2-28.3.

53 Ibid.

54 Du Toit et al **Commentary on the Criminal Procedure Act** (1993) 28.8.

55 See **S v Qgabi** 1964 (1) SA 261 (T).

56 Clause 45 of the draft bill contained in Discussion Paper 91: Sentencing (A New Sentencing Framework).

57 Ibid, Clause 46.

- (a) injury, loss or damage resulting from the offence;
- (b) injury, loss or damage resulting from -
 - (i) any other offence which is to be taken into account specifically in the determination of sentence; or
 - (ii) a course of conduct consisting of a series of criminal acts of the same or similar character of which the offence for which sentence is to be imposed forms part.
- (2) A victim impact statement may be made by a person against whom the offence was committed and who suffered harm as a result of the offence or by a person nominated by such victim.
- (3) The prosecutor must seek to tender evidence of a victim impact statement where the victim is not called to give evidence and such a statement is available.
- (4) If the contents of a victim impact statement is not disputed a victim impact statement is admissible evidence on production thereof.
- (5) If the contents of a victim impact statement is disputed, the victim must be called as a witness.
- (6) If a victim who is required to give evidence requests that certain information should not be disclosed, the court must give due consideration to the interests of the victim and the reasons for the request and balance them against the interests of justice.

40.11.6 As will become apparent in the following section, **we strongly support the introduction of victim impact statements at sentencing** even though we differ with some of the views expressed by the Project Committee on Sentencing in this regard.

40.12 . **Introducing >victim impact statements= for purposes of sentencing⁵⁸**

40.12.1 **Introduction**

40.12.2 It is very difficult for any person, even a highly trained and experienced person such as a judge, to fully comprehend the range of emotions and suffering a particular victim of sexual violence might have gone through. It is also very difficult, if not impossible, to make a prognosis of what the effect of a particular act of sexual violence will have on a particular victim

58 This section is to a large extent based on Chapter 13 of the discussion document **Legal Aspects of Rape in South Africa**, 30 April 1999.

in future. This dilemma facing a judicial officer was put very eloquently by Satchwell J in **Hotzhausen v Roodt**⁵⁹ where she said:

Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited.

40.12.3 It is therefore not strange that a number of individuals and organisations have called for the increased use of victim impact statements to be presented to the court prior to sentencing, and for these statements to be used by the court for the purpose of deciding on the appropriate sentence, as well as to give the victim the opportunity to bring to the attention of all present the seriousness of the impact of crime. Victim impact statements may therefore have value for the court, those present at the hearing, including the offender, and cathartic value for the victim.

40.13 **Victim impact statements**

40.13.1 In the investigation into **Sentencing: Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)** a victim impact statement is defined as follows:⁶⁰

The Victim Impact Statement is a statement made by the victim and addressed to the presiding officer to be considered in the sentencing decisions. The Victim Impact Statement consists of a description of the harm, in terms of the physical, psychological, social and economical effect that the crime had, and will have in future, on the victim. Sometimes this statement may include the victim's statement of opinion on his feelings about the crime, the offender and the sentence that he feels is appropriate.

40.13.2 The Project Committee on Sentencing also defines >victim impact statement= in the draft Bill accompanying the discussion paper on **Sentencing (A New Sentencing Framework)**.⁶¹ This definition reads as follows:

A victim impact statement@ means a written statement by the victim or someone authorised by the Act to make a statement on behalf of the victim which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim.

59 1997 (4) SA 766 (W) at 778 G - H.

60 South African Law Commission **Issue Paper 7** (Project 82) par 2.30.

61 Discussion Paper 91, p. 128.

40.13.3 The use of victim impact statements can be seen as a measure to give victims an opportunity 'to voice their opinion about the case'.⁶² Although a victim impact statement usually takes the form of a written statement that is presented to the court as part of the pre-sentence proceedings, it can also be submitted in the form of an oral statement made in court by the victim prior to sentencing.⁶³

40.13.4 It is important to examine some of the problems relating to victim impact statements in relation to sexual offences: Firstly, the impact of a sexual crime is mediated by a number of factors including the circumstances of the crime, the relationship of the offender to the victim, the victim's psycho-social adjustment at the time of, and prior to, the commission of the crime, the degree of support the victim was offered both immediately and in the long term after the event, whether the victim was offered some form of post-trauma counselling and assistance, the age of the victim, the victim's ability to understand the meaning of the sexual assault, assistance given to the victim during the criminal justice process, etc. Secondly, the provision of quality counselling services both immediately and for a period of time after the sexual assault assists in the resolution of trauma and therefore in the post traumatic psycho-social adjustment of the victim, and therefore reduces the impact of the sexual violence upon the victim. This would in turn influence the content of a victim impact statement. Sadly, however, counselling services are not available to all victims. Thirdly, even where victims wish to present the court with a victim impact statement, there will be vast variations in the articulateness and clarity with which a victim is able to describe the impact of the crime on their lives. The result is that if the court gives weight to the victim impact statement at the sentencing phase, the offender could possibly benefit from the provision of counselling and support services to the victim, and that offenders who commit sexual offences in areas in which there is little provision of services to victims, could be severely compromised.

40.13.5 The ability to assess and project the future impact of a sexual crime even by an expert witness is also dependent on a number of factors that relate to the training, knowledge and expertise of the witness. The impact of the trauma may also be affected by mediating and ongoing life experiences of the victim which are beyond the ability of the victim or expert witness to anticipate or control.

62 Lirieka Meintjies-Van der Walt >Towards victims= empowerment in the criminal justice system= (1998) **SACJ** at 166.

40.13.6 In the Report on **Sentencing: A new Sentencing Framework** the South African Law Commission recommends that it shall be mandatory for the proposed Sentencing Council to facilitate and establish a programme of judicial education on sentencing. The Project Committee on sexual offences concurs with this proposed clause.

40.13.7 Offenders, on the other hand, may have little or no knowledge of, or control over a victim=s pre-existing vulnerability. They may also have no control over the availability of expert assistance and assessment of the crime upon their victim(s). This raises the question of whether it is appropriate, where the victim is vulnerable to greater negative impact of a traumatic event on their lives and well-being, that the offender should be more heavily penalised.

40.13.8 The Project Committee on Sexual Offences are of the opinion that it is important to understand that there is a distinction between the broad concept of reparation and compensation. This is particularly relevant when considering child victims as their injuries often appear at a future date and the fact that a child may not have any physical injuries might require more treatment of a psychological nature. In this regard orders for reparation should be adequate to cover what would otherwise be claimed in a civil case. This will avoid multiple court processes and so lessen trauma on the child victim.

40.13.9 **The Commission accordingly endorses the recommendation contained in the Report on Sentencing: A New Sentencing Framework that the proposed Sentencing Council facilitate and establish a programme of judicial education on sentencing and recommends that judicial officers receive appropriate training and information on the potential impact of sexual crimes on victims generally. Such training should include information about the use of and potential impact of psychological violence and psychological manipulation of the victim, including the family of the victim where the victim is a child. We further recommend that judicial officers should assess, and take into account, the offender=s knowledge, use and manipulation of the particular victim=s vulnerability for the purpose of sentencing.**

40.14 **Current position in South Africa**

40.14.1 South African law does not, at present, contain any express provisions on the use of victim impact statements. Although there are no legal rules precluding the acceptance of

a statement by the victim on the impact of the sexual assault, there are also no measures that require the preparation and submission to the court of such statements as a matter of course as the court may hear, in terms of section 274(1) of the Criminal Procedure Act 51 of 1977, such evidence as it deems appropriate in order to inform itself as to the proper sentence to be passed.

40.15 **The current position in some other jurisdictions**

40.15.1 **Introduction**

40.15.2 At present, legislation allowing for some form of 'victim participation' is in force in the United States (in 48 states), Canada, New Zealand and Australia.⁶⁴ The form, contents and means of implementation of victim impact statements vary greatly between different jurisdictions. Responsibility for the preparation of the victim impact statement can rest with criminal justice personnel, such as the prosecutor, police or probation officer, or it can rest with an independent outside organisation, such as an NGO providing services to victims.⁶⁵

40.15.3 **Canada**

40.15.3.1 Section 772 of the Canadian Criminal Code requires a court to consider >any statement of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence= for the purpose of determining sentence. Such statement must be prepared in writing. The fact that a victim impact statement has been prepared does not prevent the court from considering any other evidence concerning the victim of the offence for purposes of sentencing.

40.15.3.2 For the purposes of this section, the term >victim= includes not only the person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence, but could also (where the victim is dead, ill or otherwise incapable of making a statement) include, amongst others, the spouse or a relative of the victim.

40.15.4 **Australia**

64 Lirieka Meintjies-Van der Walt >Towards victims= empowerment in the criminal justice system= (1998) **SACJ** at 166.

40.15.4.1 Certain Australian jurisdictions have enacted legislation requiring courts to consider victim impact statements before sentencing. Section 429AB of the Crimes Act 1900 of the Australian Capital Territories, for example, requires a court to have regard to a victim impact statement, and prohibits the drawing of any inference about the harm suffered by a victim from the fact that a victim impact statement is not tendered in respect of the offence. The victim must consent in writing to the submission of a victim impact statement by the prosecutor.

40.15.4.2 The relevant part of the section reads as follows:

- (1) A court in determining the sentence to be imposed in respect of an offence -
- (a) shall have regard to any victim impact statement tendered in respect of an offence; and
 - (b) shall not draw any inference about the harm suffered by a victim from the fact that a victim impact statement is not tendered in respect of the offence.

The term >harm= is defined to include:

- Physical injury;
- Mental injury or emotional suffering, including grief;
- Pregnancy;
- Economic loss; and
- Substantial impairment of rights accorded by law.

40.15.4.3 This section came into effect on 15 June 1995 and insufficient time has passed to assess its impact on ACT sentencing practices. However, concerns raised in relation to victim impact statements and sexual assault cases included the undesirability of producing written statements to the court which focussed solely on the effects of the offence on the victim.⁶⁶ It was argued that this placed the victim, not the offender, on trial. Standards of appropriate >victim behaviour= would be used to assess whether a victim of sexual assault had reacted >reasonably= in the circumstances. Such an assessment would necessarily be highly subjective and ultimately unhelpful to the victim.

65 South African Law Commission **Issue Paper 7** (Project 82) par 2.32.

66 See further, Community Law Reform Committee of the Australian Capital Territory **Victims of Crime** Report No. 6 Canberra 1993.

40.15.4.4 The new amendments provides that victim impact statements should be made voluntarily, with the consent of the victim in writing. Further, the court shall not draw any adverse inference about the harm suffered by a victim from the fact that a victim impact statement has not been tendered. Such provisions go some way in ensuring that the above concerns about victim impact statements are addressed.

40.16 Discussion and evaluation

40.16.1 The duty to consider victim impact statements

40.16.2 In the Issue Paper on **Sentencing: Restorative Justice**, it is proposed that victim impact statements ought to be generally admissible at sentencing hearings. The purpose of such statements should be to provide a measure of the seriousness of the offence.⁶⁷ This proposal is confirmed in the discussion paper on **Sentencing (A New Sentencing Framework)** where the Commission concludes that there is sufficient justification for the inclusion of a provision in the Sentencing Framework Bill which will formally recognise the use of victim impact statements at the sentencing stage of the trial.⁶⁸ The Commission warns, however, that some safeguards are needed against an offender being prejudiced by a victim impact statement that is inaccurate. For this reason, the Commission proposes that where a victim impact statement is challenged, it should not be admitted as evidence and the victim should not be required to testify.⁶⁹ In practice, prosecutors frequently lead evidence on the effect of the crime on the victim during the main trial. This makes it unnecessary to recall the victim at sentencing stage as the necessary evidence is already on record. Further, the Commission is of the firm opinion that victim impact statements should be admissible in either oral or written form.

40.16.3 As explained above, we believe that the current legal position already allows for >victim impact statements= to be admissible for purposes of sentencing, even though there are no express provisions to this effect. However, the Project Committee on Sexual Offences sees no harm in clearly spelling out the legal position as to the admissibility of victim impact statements at the sentencing stage of a trial. **We therefore support, with the reservations listed below, the inclusion of a clause on victim impact statements, in either oral or written form, in the draft Sentencing Framework Bill.**

67 South African Law Commission **Issue Paper 7** (Project 82) par 4.7.

68 Par 3.7.23 of Discussion Paper 91.

69 Ibid.

40.16.4 In the Sentencing Framework Bill, the Commission has accepted that the prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of the victim and the impact of the crime on the victim. No such obligation is placed upon the court. As far as the Project Committee on Sexual Offences is concerned, this is the real issue. In practice, the complainant=s evidence on the impact of the sexual assault is often led during the course of presentation of evidence during the >main trial phase= aimed at determining the guilt or innocence of the accused.⁷⁰ However, it may occur that the information is not made available to the court by the prosecution, for example, where the evidence was not led during the main trial, or where the court ruled that it was not admissible for purposes of determining whether or not the accused should be convicted, and the prosecutor then fails to present the information during sentencing proceedings. Placing the obligation on the prosecution will therefore only solve half of the problem.

40.16.5 Apart from the fact that such omission potentially denies the presiding officer a comprehensive understanding of the impact of the act of sexual violence on the complainant, it also allows room for inappropriate assumptions about the effects of the violence. Hansson recounts the example of a rape trial where the victim had been abducted, raped and then held captive overnight in a deserted building by the accused. In sentencing, the regional court magistrate commented that this complainant was unlikely to have suffered psychological damage, because of the fact that she was not a virgin at the time.⁷¹

40.16.6 In the light of the significance that information on the impact of the sexual offence *should* have in the determination of an appropriate sentence and the fact that, in practice, it may occur that this evidence is neither produced by the prosecution nor requested by the court, **the Commission recommends the introduction of a legislative provision that *directs* the consideration of such information by the court for sentencing purposes, rather than allowing the court to use its discretion about whether or not to consider the information.** This would be in line with similar provisions in other jurisdictions.

34.16.7 The Project Committee on Sentencing, on the other hand, gives the sentencing court the discretion to receive evidence on sentencing to >inform itself as to the proper sentence

70 Lirieka Meintjies-Van der Walt >Towards victims= empowerment in the criminal justice system= (1998) **SACJ** at 166.

71 Desiree Hansson >Interim reflections on the Cape attorney general=s task group on rape= in Saras Jagwanth et al (eds) **Women and the Law** (1994) at 403.

to be passed.⁷² The sentencing court **may** call for and consider such evidence (including victim impact statements), but is under no obligation to do so. This is in line with the principle of proportionate sentences where the court must have regard to the seriousness of the offence committed and the social harm caused by the commission of the offence which underlies the Sentencing Framework Bill.⁷³

40.16.8 It is important that oral evidence, as well as written statements, should be permitted. It seldom happens that the proceedings on the merits and the sentencing phase are finalised on the same court day. If evidence of the impact of the sexual offence on the complainant is not heard during the 'main' trial, the presentation of this information will require the victim to return to court for a second time to testify. This not only implies additional expense to the State and additional inconvenience to the complainant, but may significantly contribute to secondary victimisation caused by being confronted with the accused, and possibly being cross-examined by the defence, a second time.

40.16.9 For this reason, the Commission recommended in the Sentencing Framework Bill that if the contents of a victim impact statement are not disputed, it will be admissible evidence on production thereof.⁷⁴ If the contents of a victim impact statement are disputed, it is recommended that the victim be called as a witness.⁷⁵ An alternative is to provide in legislation for the presentation of such evidence by affidavit.⁷⁶ In keeping with the general rules set out above, this affidavit will only be regarded as accepted evidence under oath if the other party admits to the contents of the statement. If the other party does not agree with the contents, the complainant will have to testify in person, and may be cross-examined.

40.16.10 **The Project Committee on Sexual Offences supports the direction taken by the Commission in the discussion paper on Sentencing (A New Sentencing Framework) and recommends that uncontested victim impact statements be admissible evidence on**

72 Clause 45(1) of the Sentencing Framework Bill.

73 Clause 3(1) of the Sentencing Framework Bill. Note the absence of the third traditional category, the personal circumstances of the offender.

74 Clause 46(4) of the Sentencing Framework Bill, Discussion Paper 91.

75 In **Issue Paper 7** (par 4.7) the Project Committee on Sentencing took the position that the author of a victim impact statement should always be subject to cross-examination on the contents of the statement.

76 This suggestion is made in the discussion document **Legal Aspects of Rape in South Africa**, 30 April 1999, p. 135.

production thereof. If the contents of a victim impact statement are disputed, the author and / or the victim must unfortunately be called as a witness.

40.16.11 There is a danger that a victim impact statement might become a terrible self-fulfilling prophecy. If, for instance, a victim states that his or her life was destroyed by the offence committed, then that victim might never become a survivor. Ironic also is the fact that a sexual offender might benefit, sentencing wise, should the victim state that the offence had little or no impact. This is untenable and it becomes evident that the time victim impact statements are generally introduced (at sentencing stage) is more important.

40.16.12 To address this concern, **we recommend also that victim impact statements be obtained and be admitted at parole hearings of the offender.** In this regard, evidence from significant others working or interacting with the victim and his or her family should be canvassed. At this stage, the impact of the offence on the victim will not be limited to speculation or observation over a short period of time, but will be real in every sense of the word. This is also the approach adopted by the Project Committee on Sentencing, which proposes the inclusion of the following clause in the draft Sentencing Bill:

47. Victims and release of offenders from prison.

- (1) Where a person has been convicted of an offence involving violence against another person and is sentenced to a term imprisonment of two years or more that is not suspended, the judgment at sentence must explain to any victims of the crime, including the next of kin of a deceased victim, that they may inform the Commissioner that they wish to be notified of any hearing of a Parole and Correctional Supervision Board where the conditional release of such offender is being considered, so that they can attend such hearing and make representations to it as specified in section 75(4) of the Correctional Services Act.
- (2) Where the victim is incapable of informing the Commissioner as contemplated in subsection (1) the information may be conveyed by a relative or other representative of the victim.
- (3) If the victims or their next of kin or representatives referred to in subsection (2) intend to make such representations or to attend such a meeting of the Correctional Supervision and Parole Board, they have to inform the Commissioner of their intention and keep the Commissioner informed of any change of address.

40.16.13 The long term adjustment of trauma victims is heavily dependent on the support and assistance they may receive from their social network, the availability of therapeutic and trauma support services, events prior and subsequent to the crime itself, and not only the direct impact of the crime and the circumstances in which it was committed. It would therefore not be appropriate for the granting of parole to be dependent only on factors relating to the victim=s post traumatic adjustment and functioning over which the offender / potential parolee has no control. Again this could result in the possibility that offenders who have offended against socially and psychologically disadvantaged victims could be disadvantaged during the parole assessment process.

40.16.14 However, it is possible (and indeed appropriate) that parole conditions be structured around the potential safety and well-being of the victim. For example, where a victim expresses considerable anxiety about personal safety once the offender has been released back into the community, conditions of parole could be set in place limiting the freedom of movement of the parolee, or where the offender is a family member, the release of the parolee back into the family unit may be vetoed or structured in such a way that the victim is afforded maximum protection.

40.16.15 It is also necessary to make provision for a victim who does not feel comfortable to come to court to give evidence that could assist in determining parole conditions to make use of closed circuit television and or an intermediary.

40.16.16 **In this context, the Project Committee on Sexual Offences accordingly recommends that:**

- **a clause on victim impact statements, in either oral or written form, be included in the draft Sentencing Framework Bill.**
- **Evidence from victims be used at this point to assist the Correctional Supervision and Parole Board in determining the conditions of parole, rather than determining parole itself;**
- **Evidence from victims on parole may be given via closed circuit television and / or with the assistance of an intermediary;**

- Evidence from significant others working or interacting with the victim and his or her family must be available to the Correctional Supervision and Parole Board where it is available and appropriate;
- Parole conditions should take into account the safety and well-being of the victim and family;
- The victim, or the next of kin of a deceased victim, should be kept informed by the Department of Correctional Services of decisions made in relation to both parole itself as well as the conditions of parole;
- The victim, or the next of kin of a deceased victim, should be given information about where, and the process of how to inform a parole officer should the offender violate parole conditions. Local police stations should be informed by Correctional Services of all released parolees in their area. The local police station should serve as the reporting body where reporting is a condition of parole and the place of reporting if a released offender breaches his or her parole conditions. The latter service should be available 24 hours a day as parole conditions may be violated after hours as it is common for a parole condition to specify that the parolee must work and the risk of violating other parole conditions is then more acute after hours.

40.16.17 These recommendations can easily be accommodated by adding the following subclauses to the clause proposed by the Project Committee on Sentencing above:

47. Victims and release of offenders from prison.

- (4) If the victim or the victim=s next of kin or representatives referred to in subsection (2) has informed the Commissioner of their intention to make such representations or to attend such a meeting of the Correctional Supervision and Parole Board, the Commissioner in turn must inform the victim or their next of kin or representatives of the date, time and place of such meeting.

- (5) At such meeting of the Correctional Supervision and Parole Board or as soon as possible thereafter, the Board must inform the victim or the victim=s next of kin or representatives of
- (a) decisions made in relation to both the granting of parole itself as well as the conditions of parole;
- (b) the available remedies and the steps to be taken to report breaches by the convicted person of the conditions of his or her parole.
- (6) Representations as contemplated in subsection (1) made by any victim, including the next of kin of a deceased victim, may assist the Correctional Supervision and Parole Board in determining the conditions of parole.

40.18 **Should the victim impact statement include the victim=s opinion on sentence?**

40.18.1 While the Project Committee on Sexual Offences acknowledges the broad discretion which the courts have in determining an appropriate sentence, it believes that complainants should be allowed an opportunity to express their opinion in the victim impact statement on the question of an appropriate sentence, as is permitted in certain other jurisdictions.⁷⁷ This is in contrast to the position adopted by the South African Law Commission=s Project Committee on Sentencing in Issue Paper 7 and Discussion Paper 91 which suggested that victim impact statements ought to address the actual consequences of the offence on the victim and should not address the question of an appropriate sentence which ought to be imposed.⁷⁸ **The Project Committee on Sexual Offences sees no harm in allowing a victim to make recommendations regarding an appropriate sentence to the presiding officer, provided that it is well understood that the presiding officer is under no obligation to follow this recommendation.** This recommendation can be given effect to by adding the following underlined words to the definition of >victim impact statement= in the Sentencing Framework Bill:

>Victim impact statement= means a written or oral statement by the victim or someone authorised by the Act to make a statement on behalf of the victim which reflects the

77 Lirieka Meintjies-Van der Walt >Towards victims= empowerment in the criminal justice system= (1998) **SACJ** at 166.

78 **Issue Paper 7** (Project 82) par 4.7.

impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim and which may include a suggestion by the victim as to an appropriate sentence for the offender.

40.19 **Duty to prepare a victim impact Statement**

40.19.1 **In terms of responsibility for the preparation of the victim impact statement, it is proposed that the prosecution should have the ultimate duty to ensure that such evidence or statement is available for submission in court.**⁷⁹ As a matter of policy, prosecutors should be directed to enlist the assistance of NGOs providing specialised services to victims of sexual assault in the preparation of such statements.

40.19.2 In conclusion, it should be recognised that the introduction of victim impact statements should not be regarded as the only measure to enhance victim satisfaction with the criminal justice system. Research in other jurisdictions indicates that dissatisfaction with the courts and prosecution stems from the failure of the authorities 'to show any interest in the victim as an individual'.⁸⁰ The proper use of evidence on the impact of an act of sexual violence may go some way towards addressing this problem, and will also serve to lay a basis for an appropriate order for compensation.

40.20 **Victim compensation and restitution**⁸¹

40.20.1 **Introduction**

40.20.2 Internationally, compensation and restitution to victims of violent crimes have been established in two ways - through state compensation schemes or through the offenders themselves. Where state compensation schemes do not exist, the offenders may be required to make the compensation or restitution. This can be done in one of the following ways:⁸²

79 This is also the position adopted in the Sentencing Framework Bill by the Project Committee on Sentencing.

80 Lirieka Meintjies-Van der Walt >Towards victims= empowerment in the criminal justice system= (1998) **SACJ** at 166.

81 The section is based to a large extent on Chapter 14 of the discussion document **Legal Aspects of Rape in South Africa**, 30 April 1999.

82 Lirieka Meintjies-Van der Walt >Towards victims= empowerment strategies in the criminal justice process= 1988 (11) **SACJ** at 162.

- The victim must bring a civil claim against the offender;
- The state must enter into a diversion agreement, that is, an appropriate order that may not necessarily involve monetary compensation; or
- The court must make a compensation order that forms part of the sentence of the offender.

40.20.3 The issue of victim compensation is addressed in sections 12 and 13 of the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1992), to which South Africa is a signatory. It provides that:

- 12 When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
 - (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
 - (b) The family, in particular dependents, of persons who have died or become physically or mentally incapacitated as a result of such victimization.
- 13 The establishing, strengthening and expansion of national funds or compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

40.21 **The current position in South Africa**

40.21.1 **Compensation by the accused**

40.21.1.1 An alternative to a civil claim for damages is to ask the presiding officer in the criminal trial to make an award for damages. This is provided for in the **Criminal Procedure Act** 51 of 1977 in two instances after finding the accused guilty. In the first instance, section 300 of the Criminal Procedure Act 51 of 1977 makes provision for the payment of compensation to victims of crime at the request of the prosecutor, provided he or she is instructed to do so by the complainant in the case. The Act specifically provides that the court may award compensation where an offence causes >damage to or loss of property=.

40.21.1.2 Presently, the award of compensation to an individual applies in situations where

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- There has been a conviction;⁸³
- The conviction relates to an offence that caused damage to or the loss of property, including money;⁸⁴
- It is established that the loss or damage was caused as a direct result of the commission of the offence of which the accused was convicted;⁸⁵
- There is an application after the conviction by the complainant,⁸⁶ and
- All relevant facts have to be obtained and in this regard the accused is entitled to lead evidence and to address the court.⁸⁷

40.21.1.3 Unfortunately, section 300 is of little use as the compensation is expressly limited to compensation for >damage to or loss of property (including money) belonging to some other person=.⁸⁸

40.21.1.4 In the second instance, section 297 (which deals with the conditional or unconditional postponement or suspension of sentence) of the **Criminal Procedure Act** allows the presiding officer to impose as a condition of a suspended sentence, the payment of or making of compensation. There is no limitation as to the ambit of the compensation, and as far as a monetary limit is concerned, the limits would be determined by the Magistrates= and Supreme Court Acts. It would therefore be open for a presiding officer to suspend a whole or part of the sentence on condition that the convicted person pay compensation in a stipulated amount to the victim. Another advantage of section 297 above section 300 of the **Criminal Procedure Act** is that the latter award of compensation has the status of a civil judgement which means it would have to be enforced in a civil court and could therefore mean little if the accused was a person of straw,⁸⁹ whereas in section 297 the convicted person has a very real interest in finding the money and might pursue that option a little more vigorously.⁹⁰

83 Section 300 (5)(b)(1) of the **Criminal Procedure Act** 51 of 1977.

84 Section 300 (5)(b)(2) of the **Criminal Procedure Act** 51 of 1977.

85 Idem.

86 Section 300 (5)(b)(5) of the **Criminal Procedure Act** 51 of 1977.

87 Section 300 (5)(b)(7) of the **Criminal Procedure Act** 51 of 1977.

88 See the criticism of this section in **S v Liberty Shipping and Forwarding (Pty) Ltd and others** 1982 (4) SA 281 (D).

89 Hence the reluctance of the courts to use this particular provision. See, for instance, **S v Bepela** 1978 (2) SA 22 (B).

90 **S v Edward** 1978 (1) SA 317 (NC).

40.21.1.5 However, the problem with regard to section 297 of the **Criminal Procedure Act** and this envisaged procedure, is its implementation. The presiding officer will suspend a portion of the sentence on condition of payment of compensation. In the case of sexual assault, the portion of the sentence that is not suspended will more often than not be a sentence of imprisonment. If the offender is imprisoned, it will not be possible for him or her to generate income so as to pay the compensation, unless he or she has current assets or if family or friends raise the money. Similarly, if the portion of the sentence that is not suspended is a fine, this will limit the chances of the offender being able to afford to pay compensation, unless of course he or she is wealthy in his or her own right, or has wealthy relations or friends. Again one must conclude that section 297 of the **Criminal Procedure Act** too is effectively of little or no assistance to the victim in his or her quest for compensation.

40.21.1.6 **State compensation scheme**

There is at present no state-funded compensation scheme for victims of violent crime in operation in South Africa.

40.22 **Current position in other jurisdictions - Canada**

40.22.1 In Canada, the courts have increasingly made use of compensation orders as a sentencing option. The courts are now required to consider restitution in all cases involving either harm to property, or expenses arising from bodily injuries. In granting restitution, the court may consider a victim impact statement, and must take into consideration the offender's ability to provide restitution. If monetary compensation is ordered, payments can be spread over a period of time. Restitution can also be made in the form of work. The penalty for ignoring a court order granting restitution is imprisonment.

40.23 **Discussion**

40.23.1 Meintjies-Van der Walt submits that, aside from the fact that the Criminal Procedure Act does not make provision for victims of personal crime, there are also other problems with the application of this Act.⁹¹ She sets these out as follows -

91 1998 (11) **SACJ** at 162.

- The determination of compensation may be difficult for presiding officers because the present judicial mind-set appears to have difficulty in reconciling what they perceive as an essentially civil procedure with criminal sentencing. She cites the judgement in **S v Lombaard**⁹² as an example of this problem. In this matter the court held that the determination of compensation was a complicated civil matter which could only be decided if all the points in issue were defined in pleadings, and evidence was led.
- The question of what should happen if an offender fails to comply with a compensation order is problematic. Meintjies-Van der Walt refers to the review judgment of **S v Medell**⁹³ in which the court held that an order for compensation that was not carried out, could not result in imprisonment, because the incarceration of an offender for the failure to abide by a compensation order amounted to civil imprisonment for debt, which has been judged unconstitutional.

40.23.2 In response to public dissatisfaction with the criminal justice system and the emerging victims= rights movement in South Africa, the South African Law Commission has published an issue paper⁹⁴ on Restorative Justice, which addresses the issue of victim compensation. The Project Committee on Sentencing argues that the introduction of a central compensation scheme for victims of crime in South Africa is a matter of urgency. It believes that this will restore confidence in the administration of justice.

40.23.3 The Project Committee on Sentencing recommends in Issue Paper 7 that a compensation scheme be established that should be known as the >Criminal Injuries Compensation Scheme=, and they set out the following:

1. The scheme should be funded by some or more of the following -
 - 20% of all fines that are imposed by the courts;
 - A surcharge of R 50 for every conviction in court, to be paid by the accused;
 - The proceeds of crime;
 - An allocation within the annual state budget.

92 1997 (1) SACR 80 (T).

93 1997 (1) SACR 682 (C) at 686 B - C.

94 **Issue Paper 7.**

2. The definition of a >victim= and special reference to rape victims. They define >victims= as: >persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws=.

The term therefore includes direct victims (the person who was directly prejudiced by the commission of the crime) as well as indirect victims (persons who were not directly involved in the crime, but who were directly prejudiced as a result thereof, for example the family of a victim of murder).

3. The victims that would qualify for compensation awards.

4. The requirements for securing victim compensation.

40.23.4 The scope of this discussion paper does not allow an analysis of the content or merits of the Issue Paper referred to. We do however, in principle, support the development of such a compensation scheme and eagerly await the outcome of the work of the Project Committee on Sentencing on a compensation fund for victims of crime.

40.23.5 Similar to the Project Committee on Sentencing, we recognise the enormous financial burden that a scheme of this nature may have on the state. We also know that the physical, emotional and psychological damage to a rape victim is unquantifiable and cannot really be measured in monetary terms. Moreover, we are concerned about the ramifications of monetary compensation in relation to acts of sexual violence. Our experience of criminal trials has repeatedly confirmed our idea that complainants of sexual violence have to fight a battle to be believed in a court of law, to be regarded as credible witnesses and to be treated with dignity and respect. We are sensitive to the fact that any form of monetary compensation for sexual offences may in fact result in counsel for the defence casting the aspersion on complainants that they are only claiming to have been raped or violated because they are aware that they might, if the court finds the accused guilty, receive monetary compensation. Rather than assisting in the recovery of the survivor, monetary compensation may become a further source of >secondary victimisation=.

40.23.6 In this regard the Project Committee on Sentencing recommend that by the year 2002, or sooner if possible, limited compensation for rape survivors be implemented to assist

them medically and to ensure that they receive appropriate social and psychological support. The amount of R 2000 is proposed. This could be used by the survivor at his or her own discretion for the purchase of services and support not currently available through the State (or their private medical aid).⁹⁵

40.23.7 **Recommendation**

40.23.7.1 **The Project Committee on Sexual Offences in principle supports the development of a state compensation scheme for victims of sexual offences.⁹⁶ We recommend, however, that:**

- **Until a compensation scheme is operational and is proved to serve as more than a mere symbolic gesture to victims of crime, the state bears the cost of any medical and/or psychological treatment incurred by the victim/survivor;**
- **Clause 37 of the of the draft Sentencing Framework Bill is accepted subject to the inclusion of the words Acompensation and future loss, whether direct or indirect@.**

95 South African Law Commission **Discussion Paper 97** 'Sentencing (A Compensation Scheme for Victims of Crime in south Africa)' 15 February 2001 at p 203. The closing date for comments on that Discussion Paper was the 31 July 2001. The Project Committee on Sentencing is planning 6 workshops in October / November to canvas public opinion on the recommendations contained therein.

96 See paragraph 41 .9.9 above on the possible amendments to section 300 of the **Criminal Procedure Act** 51 of 1977.

CHAPTER 41**THE SENTENCING OF SEXUAL OFFENDERS****41.1. Introduction**

41.1.1 When considering sentencing in relation to sexual offenders, it is important to bear in mind that sex offenders are not a homogenous group. The differences are illustrated by contemplating a teenage gang rapist as opposed to a paedophile. Consequently, sentencing of sex offenders needs to take into account various levels of sexually criminal behaviour and have different strategies to deal with those differences. Sentencing, in general, has recently¹ been the focus of much attention in the media with an outcry from the community, both for more stringent punishment and for offenders to serve a more realistic portion of the sentences imposed by our courts. In this regard the comments by the court² in the matter of **S v Chapman**³ should serve as a guide:

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.

41.1.2 It is important to note that the South African Law Commission has a dedicated Project Committee on Sentencing.⁴ This Project Committee has as its mandate sentencing reform in general and also to consider the position of victims in the criminal justice system.⁵

¹The sentencing of sexual offenders, however, has been a matter of concern for a long period of time. See also Steven Collings 'Rape sentences - An empirical analysis' 1985 (9) **SACC** 264.

²As per Mahomed CJ, Van Heerden JA and Olivier JA.

³1997 (3) SA 341 (SCA) at 345 C - D.

⁴Project 82: Sentencing. The Project Leader of this 'new' Committee is Professor Dirk Van Zyl-Smit. The Committee also had a predecessor, chaired by the Honourable Madam Justice Leonora van den Heever.

⁵Two Issue Papers have been released: **Issue Paper 7: Sentencing: Restorative Justice (Compensation for victims of crime and victim empowerment)** and **Issue Paper 11: Sentencing: Mandatory Minimum Sentences.**

That Project Committee is preparing a comprehensive legislative framework for sentencing in South Africa and is finalising a discussion paper and draft legislation in this regard. The Project Committee on Sexual Offences has taken note of these developments and attempts were made to limit discussions to the sentencing of sexual offenders specifically. Obviously, recommendations made in respect of the sentencing of sexual offenders will have to fit into this general legislative framework and *vice versa*.

41.2 The Issue Paper and comments to the Issue Paper

41.2.1 Limited attention was given to the sentencing of the sexual offender in the Issue Paper.⁶ Besides setting out the fundamental principles when dealing with the sentencing of sexual offences, three additional options were raised. These are:

- chemical castration;
- making it an offence for convicted sexual offenders to loiter 'in or near a school ground, public park or bathing area'; and
- imposing a duty to inform the community into which a convicted sexual offender is to be released.

41.2.2 Both respondents to the Issue Paper and the spate of recent newspaper reports indicate that sentencing is perhaps one of the most controversial aspects of the criminal justice system.

41.2.3 Although some respondents⁷ concede that sentencing of sexual offenders is a highly individualised matter where each case must be judged according to its merits, most were clearly of the view that the present sentences imposed on sexual offenders were inappropriately lenient. The **Association for the Physical Disabled Eastern Cape - Port Elizabeth Region**⁸ expressed its disgust with the present sentencing regime in the following terms:

The rapist / abuser most often does not get a sentence severe enough to match the crime committed. The government has to take a much stricter stand against this most disgusting crime committed by perpetrators. If the government really wants things to

⁶See section 5.11 of the Issue Paper.

⁷Ms W L Clark, senior public prosecutor, Verulam;

⁸Submission prepared by Mrs M Meintjes, the Chief Social Worker.

change then they must start by bringing back the death penalty and stricter sentences. The government is absolutely blind to the fact that they are enabling people to get away with (sexual) offences because the offender knows he will be lightly sentenced or receive community service.

41.2.4 The **Association for People with Physical Disabilities (Northern Cape)**⁹ share this view and is opposed to any treatment or diversion programmes for offenders. The Association further expresses support for the Canadian position where conditional release may be linked to chemical castration. The issue of chemical castration is dealt with more in Chapter 42 below.

41.2.5 The **SAPS Child Protection Unit, East Rand**¹⁰ also identifies sentencing of sexual offenders as problematic and argues for mandatory sentences for child sexual abuse. It says current sentences do not match the crime and do not serve as a severe enough punishment or as a deterrent to potential abusers.¹¹ **Women Against Child Abuse** submit that says mandatory prison sentences must be enforced for crimes against children. The organisation suggests life imprisonment with no chance of parole as a possible sentence for murder, sodomy, aggravated rape and rape.

41.3 **The characteristics of sentencing**

41.3.1 Ashworth¹² points out that sentencing is the stage after the determination of criminal liability and may be characterised as a public, judicial assessment of the degree to which the offender may rightly be ordered to suffer legal punishment. Punishment is the sanction of the criminal law. There is general consensus on the two outstanding characteristics of punishment, namely the intentional infliction of suffering upon an offender and the expression of the community's condemnation and disapproval of the offender and his conduct.¹³ Criminal

⁹Submission prepared by **Ms E B Kanguwe**.

¹⁰Submission signed by **Capt (f) Van der Klashorst**.

¹¹This is also the view of **Mr J Meyer**, SAPS Legal Services, Johannesburg Central Area.

¹²AJ Asworth "Criminal justice and deserved sentences" **Criminal Law Review** 1989 36 340-55.

¹³MA Rabie SA Strauss **Punishment : An introduction to principles** fourth edition Lex Patria 1985 6.

punishment entails, however, more than the infliction of suffering. It is the infliction of suffering on account of the commission of a crime.

41.3.2 A popular view is that the ultimate aim of punishment is to protect the community against crime. The main differences of opinion arise as to the best method to achieve this. One method of doing this is by directly incapacitating the offender, for example by imposing the death penalty. This method of coercing the offender directly can be described as direct prevention. A second method is so-called indirect prevention where the aim is to persuade the offender to cease his or her activities voluntarily.

41.4 The aims of punishment¹⁴

41.4.1 The aims of punishment describe the result that is expected to be achieved by means of punishment. The generally accepted standard applied by our courts was laid down in the case of **S v Rabie**¹⁵ in the following terms:

Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

In **S v Khumalo**¹⁶ these aims are stated as follows:

In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment ... , namely deterrent, preventative, reformative and retributive

41.4.2 There are a number aims, also called theories of punishment, recognised by the courts in South Africa. For the purpose of this paper a detailed discussion of these theories is not deemed necessary and a brief reference to what is understood by these aims or theories would suffice. In principle the aims or theories of punishment belong to the absolute theory of retribution, the relative theory of prevention or a combination of these two.

¹⁴This section is based largely on para 2.5 to 2.16 of **Issue Paper 11 Sentencing: Mandatory Minimum Sentences** prepared for the South African Law Commission by the Project Committee on Sentencing.

¹⁵1975 (4) SA 855 (A) at 862 G-H per Holmes JA.

¹⁶1984 (3) SA 327 (A) at 330 D-E.

41.4.3 (a) **The absolute theory - retribution**

41.4.3.1 In terms of the absolute theory of retribution, punishment is justified because a crime was committed. It is also known as the “justice” theory, because the injustice that has been brought about by the commission of a crime is said to be wiped out by the imposition of an equivalent evil upon the offender. Punishment is imposed because it has been deserved. It has also been described as the desire to make the offender suffer, neither because it is good for him or her, nor because suffering might deter him or her from further crime, but simply because it is felt that he or she deserves to suffer.

41.4.4 (b) **The relative theories**

41.4.4.1 In terms of the relative theories punishment is justified by the value of its consequences, namely the prevention of crimes. Crimes are to be prevented in order to protect society. The basic idea is that offenders should become, and citizens generally should remain law-abiding. Two types can be distinguished, namely individual prevention and general prevention.

41.4.4.2 (i) **Individual prevention**

41.4.4.2.1 Individual prevention is aimed at offenders who have already been convicted of crimes. The idea is that the offender should be prevented from repeating his or her criminal behaviour, be it through incapacitation or intimidation by the threat of punishment or through his or her rehabilitation. Thus the simplest way in which an offender can be prevented from repeating his or her crime is to render him or her permanently or temporarily incapable of committing it (for example by imposing the death penalty or life-long imprisonment).

41.4.4.2.2 A further aim is individual deterrence. The underlying idea is that a person who has already been subjected to the pain which punishment brings about will be conditioned to refrain from criminal behaviour in the future.

41.4.4.2.3 A third aim under this heading which has become increasingly popular is that the personality of the offender should be influenced so that he or she can become a law abiding citizen (rehabilitation theory). Forms of punishment aimed at achieving this are periodical

imprisonment or committal to a rehabilitation centre. Under this aim it has become customary to replace the word “punishment” with “treatment” for the latter option.

41.4.4.3 (ii) **General prevention**

41.4.4.3.1 General prevention as an aim of punishment is regarded as justified in that it is calculated to discourage people in general from committing crimes. People are thus restrained from committing crimes by the threat of punishment rather than by the imposition of punishment.

41.4.4.3.2 General deterrence is the classical aim underlying the theory of general prevention. The rationale is that people refrain from criminal activities because they know that unpleasant consequences of punishment follow the commission of crime.

41.4.4.3.3 One of the most important facets of general prevention is that the threat and imposition of punishment fulfills an educative, socialising or moralising function - punishment is a concrete expression of society’s disapproval of the act and this helps to form and strengthen the public’s moral code. Secondly, criminal laws are probably complied with by most law-abiding citizens because compliance with the law ensues automatically for them. Thirdly, the general preventative effect of the criminal sanction can also be seen in the role of the criminal law as an informer of the limits of legitimate and acceptable behaviour. Citizens also require orientation as to what conduct would expose them to punishment. Rules of conduct are unlikely to be followed unless they are reinforced by a sanction. Thus the threat of punishment is added to criminal provisions to provide a persuasion for persons to comply with these provisions.

41.4.4.4 (c) **Integrative theories**

41.4.4.4.1 Considerable criticism has been levelled against the retributive theory and the theories of prevention, pursued to their logical conclusion, also lead to unacceptable results. Accordingly attempts have been made to integrate these different theories into a single theory. Retribution is thus taken as the basis in order to ensure that justice is done and the principle of proportionality between punishment and the gravity of the offence is applied in order to prevent the aims propagated by the supporters of the prevention theories from violating principles of justice as regards the offender.

41.5. The legislative framework of sentencing in South Africa

41.5.1 South African courts have a broad discretion to determine the appropriate sentence in a particular criminal matter. This discretion may not be exercised arbitrarily, and the court is expected to act within the limits prescribed by the legislature and in accordance with the guidelines laid down by higher courts.¹⁷

41.5.2 According to Du Toit *et al*,¹⁸ the existence of a sentencing discretion is a pillar of our law which should be guarded jealously by everybody involved. In cases such as **S v Toms; S v Bruce**¹⁹ the Appellate Division expressed the view that it did not take kindly to a restriction of its sentencing powers by the legislature. The main advantage of a broad sentencing discretion advanced by proponents of such a discretion is that courts can adapt sentences to provide for the slightest differences between cases. Critics²⁰ point out, however, that the exercise of the sentencing discretion inevitably depends upon the personal views and biases of the judge or magistrate and his or her perceptions regarding the offence and its consequences.

41.5.3 Section 276 of the Criminal Procedure Act 51 of 1977 is the general enabling statutory provision as far as the various forms of punishment in criminal trials are concerned.²¹ In this section provision is made for the following forms of punishment:

- Imprisonment, including imprisonment for life or imprisonment for an indefinite period;
- periodical imprisonment;
- declaration as a habitual criminal;
- committal to any institution established by law;
- a fine;
- correctional supervision; and

¹⁷See also the detailed discussion on the court's discretion in sentencing below.

¹⁸Du Toit *E Straf in Suid-Afrika* Johannesburg: Juta (1980) 127.

¹⁹1990 (2) SA 802 (A) at 822 C-D per Corbett CJ.

²⁰See, for instance, **Legal Aspects of Rape in South Africa** 125.

²¹See also Managay Reddi 'Principles of sentencing' 1994 (3) SACJ 406 for a discussion of some case law regarding the various sentencing options.

- imprisonment after which a person may be placed under correctional supervision in the discretion of the Commissioner.

41.5.4 The death penalty and whipping as sentencing options were declared unconstitutional by the Constitutional Court in **S v Makwanyane and another**²² and **S v Williams and others**²³ respectively and can no longer be imposed by a court of law.

41.5.5 Section 276 of the **Criminal Procedure Act** 51 of 1977 is, however, subject to the other provisions of the Act, as well as those contained in other laws or the common law. Courts of law may therefore impose the punishments that they are entitled to impose under other legal provisions or under the common law. Section 276 is merely complementary to other penal provisions in the statute and common law. It is not, however, a general provision enabling courts to impose forms of punishment which do not fall within their jurisdiction. A court of law is still limited to its own prescribed sentencing jurisdiction.

41.5.6 The **Criminal Procedure Act** also contains certain specific provisions regarding the crimes for which, or the circumstances under which, certain forms of punishment may or must be imposed.

41.5.7 Periodical imprisonment, for example, may be imposed for any offence, but a minimum of 100 hours and a maximum of 2000 hours is provided for in the Act.²⁴ Other punishment may accompany periodical imprisonment. Correctional supervision may be imposed for any offence, but it may only be imposed for a fixed period of three years. Declaration as a habitual criminal means that the offender will spend an unspecified period in prison which will be at least seven years. It may only be imposed by a regional or High court and it is not a competent verdict where the person convicted is under the age of 18 years and where the punishment which may be imposed, by itself or together with other sentences, would entail imprisonment for a period exceeding 15 years.

²²1995 2 SACR 1 (CC).

²³1995 2 SACR 251 (CC).

²⁴Section 285(1) of the **Criminal Procedure Act** 51 of 1977.

41.5.8 Declaration as a habitual criminal²⁵ or a dangerous criminal²⁶ may be imposed by a regional court and a High Court if the offender represents a danger to the physical or mental well-being of other persons and if the community must be protected against the offender.

41.5.9 A dangerous offender is sentenced to an indefinite period of imprisonment and the court is obliged to direct that the offender must be brought before the court on the expiration of a period determined by it and which does not exceed the jurisdiction of the courts.²⁷

41.5.9.1 Section 286A of the **Criminal Procedure Act**,²⁸ which makes provision for the declaration of the accused as a dangerous criminal, recently came before the Supreme Court of Appeal as a result of a challenge to the constitutionality of both sections 286A and 286B of the **Criminal Procedure Act**.²⁹ In the case of **Bull, Chavulla and others v the State**,³⁰ Judge Viviers³¹ noted that the provisions of section 286A and 286B are not triggered by the commission of any particular offence, but a superior court or a regional court which has convicted the accused of "one or more offences" may, if certain requirements and procedural safeguards have been observed, declare the accused a dangerous criminal. The requirements are, first, that the court must be satisfied that the accused represents a danger to the physical or mental well-being of other persons and, second, that the community should be protected against the accused. The court has a discretion to declare that the question of whether the accused is a dangerous criminal be investigated and be reported on in terms of the provisions of section 286A (3) of the **Criminal Procedure Act**. Once the court has declared the accused a dangerous criminal, the discretion ends and the court is obliged to sentence the accused to undergo imprisonment for an indefinite period and to determine the fixed minimum term.³²

41.5.9.2 The court found that there is no constitutional objection to an indeterminate sentence, *per se*, since the protection of society is a legitimate purpose of sentencing, provided

²⁵In terms of section 286 of the **Criminal Procedure Act** 51 of 1977.

²⁶In terms of section 286A of the **Criminal Procedure Act** 51 of 1977.

²⁷Section 286B of the **Criminal Procedure Act** 51 of 1977.

²⁸51 of 1977.

²⁹Supreme Court of Appeal Case No. 221/2000.

³⁰Unreported case heard before the Supreme Court of Appeal case number 221/2000.

³¹Acting Deputy Chief Justice at p 10.

³²Section 286B (1) at p 12 of the judgement.

that the principle of gross disproportionality is respected.³³ Furthermore, it was submitted to the court that the criteria in section 286A for declaring an accused a dangerous criminal are too vague and uncertain to meet the requirements of the principle of legality, namely, that the sentence provided for should be governed by clear legal rules. After considering various definitions of dangerousness, the court concluded that a finding that an accused is a danger or threat is, in effect, a present determination that he or she will continue to be dangerous in future, and so cannot be regarded as too vague to satisfy the principle of legality.³⁴

41.5.10 The term 'correctional supervision' refers not so much to a sentence as to a collective term for a wide variety of measures which have in common that they are all applied outside of prison.³⁵ As Kriegler AJA points out in **S v R**,³⁶ none of the wide variety of measures, for instance monitoring, community service, house arrest, placement in employment, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court or the Commissioner is defined in the **Correctional Services and Supervision Matters Amendment Act 122 of 1991**.³⁷ From this it may be inferred that the legislature has left it to sentencing officers to give content and form to the concepts within the parameters indicated by the generic terms.³⁸

³³At p 23 of the judgement.

³⁴At p 33-34 of the judgement.

³⁵See also section 276A of the **Criminal Procedure Act 51 of 1977**.

³⁶1993 (1) SA 476 (A); 1993 (1) SACR 209 (A).

³⁷See now section 84 of the **Correctional Services Act 8 of 1959** and section 12 of the **Parole and Correctional Supervision Amendment Act 87 of 1997**.

³⁸In **S v Ndaba** 1993 (1) SACR 637 (A) Kriegler AJA decided that the court ought not to leave the determination of components of the sentence of correctional supervision to the correctional officer. It was for the judicial officer, as guided by professional evidence, to determine the framework of a programme within which correctional supervision will take place. It is therefore necessary for the sentencing officer to determine as far as possible the lot of the offender before the court. See also the judgment of Edeling J in **S v V** 1993 (1) SACR 736 (O).

41.5.11 A life sentence may also be imposed.³⁹ Imprisonment for life may literally mean incarceration for the natural life of the offender. Current practice is that a prisoner is not considered for release until he has served at least 20 years (previously such consideration took place sooner). Such a person is considered for release after the Minister of Correctional Services has requested the advice of the National Advisory Council on Correctional Services. The approval of this Council is required before the prisoner may be released.

41.5.12 In respect of common law crimes such as assault, theft, rape, etc, there is no statutory provision which specifies the type of punishment. In such cases the courts may impose sentences up to the maximum provided for in the Act governing their criminal jurisdiction. The punishment jurisdiction of magistrates' and regional courts is determined in terms of section 92 of the **Magistrates Court Act 32 of 1944**.⁴⁰

41.5.13 The range of punishments which may be imposed on a person convicted of a statutory crime is usually stipulated in the statute which creates the offence, either in the definition itself or in a separate penalty clause. The regular punishment for statutory crimes is normally a fine or a period of imprisonment which may not exceed a fixed maximum or both.

41.5.14 Apart from the regular punishments provided for an offence, some statutes make allowance for an increased or further punishment in addition to the normal punishment prescribed, while other statutes provide for certain penalties and orders other than the regular or increased punishment. For example, in respect of certain crimes provision is made for increased punishment (fine and/or imprisonment) in the case of a second or subsequent

³⁹Under section 51(1) of the **Criminal Law Amendment Act 105 of 1997** a High Court is obliged, if it has convicted a person of an offence referred to in Part I of Schedule 2, to sentence the person to imprisonment for life. The offences mentioned in Part I of Schedule 2 are murder, under certain circumstances and rape under certain circumstances.

⁴⁰The relevant parts of section 92 of the **Magistrates Court Act 32 of 1944** essentially provides that a court may impose a sentence of imprisonment for a period not exceeding three years, where the court is not a regional court, or not exceeding 15 years, where the court is a regional court; or a fine not exceeding R20 000, where the court is not a regional court, or not exceeding R200 000, where the court is a regional court. See also GN R 3441(GG 14298) of 31 December 1992.

conviction.⁴¹ Likewise, in respect of certain crimes the court is empowered, or even obliged upon conviction, to enquire into and assess the monetary equivalent of any advantage which the convicted person may have gained in consequence of the commission of the crime, and in addition to any punishment which may be imposed, to impose a fine equal to the amount so assessed, or, in default of payment, imprisonment for a certain maximum period.⁴²

41.6 **The court's discretion in sentencing**⁴³

41.6.1 The legislature's primary task is to define what conduct will be criminal and to provide a threat of punishment. It will ordinarily also prescribe the nature of the punishment that may be imposed and the maximum that may not be exceeded. The court's function is to impose punishment on offenders found guilty of the commission of crime. It is generally accepted that the South African courts have a discretion to determine the nature and extent of the punishment to be imposed within this framework.

41.6.2 Sentencers are also restricted by the framework of punishment created by the legislator. While judges have more freedom (except for maxima set by statutory penalty clauses, no other statutory limits apply to the criminal jurisdiction of the High Court), magistrates are more restricted. Within the legislative framework presiding officers are allowed much freedom, but the principles in terms of which they have to act have often been criticised as imprecise and vague. Certain statutory rules apply for example to the suspension and conditions of sentences. While it is frequently alleged that sentencers have a wide discretion, one should not lose sight of the limitations that do exist and that sentencers are required to make a number of decisions and the freedom to do so differs, depending on the circumstances of the case, the particular legislative framework and the principles developed by the courts.

41.6.3 There are therefore two institutions which control the exercise of the sentencing discretion, namely relevant legislation and control exercised by the courts of appeal or review.

⁴¹See for example section 170 (1) and (2) of the **Water Act**, 54 of 1956; section 46 of the **Atmospheric Pollution Prevention Act**, 45 of 1965.

⁴²See for example section 11 (2) of the Physical Planning Act, 88 of 1967.

⁴³This section is based largely on para 2.25 to 2.39 of **Issue Paper 11 Sentencing: Mandatory Minimum Sentences** prepared for the South African Law Commission by the Project Committee on Sentencing.

It should, however, be noted that control by the courts has also been subjected to criticism. For example, in **S v Pieters**⁴⁴ it was stated that a court of appeal will only reverse a decision of the trial court if it appears that the trial court has exercised its discretion in an improper or unreasonable manner. With regard to the latter, the courts have developed a number of tests for determining when it is appropriate to interfere with the trial courts' decision: for example, if the sentence imposed "induces a sense of shock" or if the sentence is 'startlingly inappropriate' or if it reveals a "striking disparity" compared to the sentence which the court of appeal would have imposed as court of first instance.⁴⁵ These tests have been described as vague and imprecise.

41.6.4 In addition to the modes of control by appellate courts which has been described in the previous paragraph, these courts also exercise control by highlighting certain principles which have to be taken into account when deciding on the appropriate sentence. In the case of imprisonment, for example, the following principles have been developed by the courts:⁴⁶

- the sentence must be authorised through statute or common law;⁴⁷
- it must not be so severe that no reasonable court would have imposed it;⁴⁸
- it must be unaffected by misdirection;⁴⁹
- it is not to be imposed lightly or without serious reflection; this is especially so where all the requirements of punishment, as well as the aims thereof, can be satisfied by another form of punishment, e.g. a fine with or without a suspended sentence;⁵⁰
- for the first offender, imprisonment is usually not desirable and alternatives should be considered;⁵¹

⁴⁴1987 3 SA 717 (A).

⁴⁵See **S v M** 1976 3 SA 644 (A); **S v N** 1988 3 SA 450 (A) at 465 I-J; **S v Petkar** 1988 3 SA 571 (A).

⁴⁶See also Du Toit et al **Commentary on the Criminal Procedure Act** 28-16F - 28-18.

⁴⁷**S v Pillay** 1977 4 SA 531 (A).

⁴⁸**S v De Jager and Another** 1965 2 SA 616 (A).

⁴⁹**S v Pillay** 1977 4 SA 531 (A).

⁵⁰**S v Holder** 1979 2 SA 70 (A) at 74H - 75A.

⁵¹**Persadh v R** 1944 NPD 357, **S v M** 1990 2 SACR 509 (E); **S v George** 1992 1 SACR 250 (W).

- youth is a factor militating against imprisonment;⁵²
- it is to be noted that first offendership or youth does not as a rule mean that imprisonment should not be imposed - they are factors against such imposition;⁵³
- high age is usually a factor against imprisonment;⁵⁴
- the fact that the accused is a breadwinner and has responsibility towards dependants, may also swing the decision against imprisonment;⁵⁵
- the fact that the accused, if kept out of prison, will retain his or her work, is an important factor against imprisonment;⁵⁶
- the nature of the crime is also relevant: it may be of such seriousness that imprisonment is the only adequate punishment;⁵⁷ and
- the interests of society will always influence the decision as to the imposition of imprisonment.⁵⁸ Society must be protected against the accused and other potential offenders and in this regard the prevalence of the crime,⁵⁹ the protection of women,⁶⁰ the maintenance of peace and tranquillity in society, etc. may be relevant.

41.6.5 Both the courts and the legislature have been criticised for the manner in which they control the sentencing discretion. The appellate courts have been criticised for their reluctance to interfere with the sentencing discretion exercised by the courts of first instance. Van Rooyen⁶¹ states that in the absence of legislative guidelines, the High Court finds itself in the position where it has to play an important role and fulfil a leadership function in developing

⁵²**S v Sakabula** 1975 3 SA 784 (C) at 787D, **S v Makkahela** 1975 3 SA 788 (C) at 789G - H.

⁵³**S v Victor** 1970 1 SA 427 (A).

⁵⁴**S v Zinn** 1969 2 SA 537 (A).

⁵⁵**S v Botha** 1970 4 SA 407 (T) at 408E; **S v Nabote** 1978 1 SA 648 (O) at 650D - E; **S v Benetti** 1975 3 SA 603 (T) at 605D - E.

⁵⁶Du Toit et al **Commentary on the Criminal Procedure Act** 28-16G.

⁵⁷**S v Maarman** 1976 3 SA 510 (A) at 512H - 513B.

⁵⁸**R v Swanepoel** 1945 AD 444 at 454.

⁵⁹**S v Malinga** 1962 1 SA 439 (T).

⁶⁰**S v J** 1975 3 SA 146 (O).

⁶¹JH van Rooyen "The decision to imprison - the courts' need for guidance" 1980 **SACC**

a sound penal policy through the shaping of guidelines in respect of the sentencing discretion. However, rules are binding but principles are merely guidelines pointing in a general direction, but not compelling it necessarily to follow that direction. By way of illustration, the principle that first offenders should not be sent to prison does not mean that first offenders may never be sent to prison. Other principles may well outweigh this particular principle.

41.6.6 Guidance by our appellate courts has also been described as vague and unsatisfactory. In **S v Scheepers**⁶² Viljoen JA, for example, expressed the view that imprisonment is justified only when it is necessary for the protection of the community to remove the offender from society and where the aims of punishment cannot be achieved through the imposition of an alternative sentence. This view was, however, rejected in **S v Holder**⁶³ where the court held that no court can prescribe to another court when to impose imprisonment.

41.6.7 The guidance provided by the courts is furthermore complicated by the different approaches in the case law to the so-called theories or aims of punishment. The following examples in the case law should illustrate this point.

41.6.8 In **S v B**⁶⁴ the court of appeal confirmed a sentence of five years imprisonment for attempted rape. The court subscribed to the view that, although in ancient times the emphasis was on retribution, in modern times the retributive aspect has tended to yield ground to the aspects of prevention and correction. However, having regard to the circumstances of the case where the complainant, a girl of 16 years, was seriously manhandled by the appellant who showed no remorse afterwards, the court took the view that the magistrate did not overemphasise the retributive aspect and correctly applied the deterrent aims of the sentence both as far as the appellant himself, as well as others, were concerned. The court confirmed the sentence of imprisonment.

41.6.9 In **R v S**⁶⁵ the accused was convicted of committing unnatural sexual acts with a number of boys. With regard to a proper sentence the court observed that, whilst

⁶²1977 2 SA 155 (A).

⁶³1979 2 SA 70 (A).

⁶⁴1985 2 SA 120 (A).

⁶⁵1956 1 SA 649 (T).

appreciating the great importance of reformative measures in this type of cases, persons who have been guilty of depraved practices should not escape jail sentences. The court should not encourage the belief that depraved conduct can be embarked upon with no consequence other than that of psychiatric treatment. The court stated that the public will feel alarmed if no real punitive sanction is attached to such conduct.

41.6.10 In **S v S**⁶⁶ the court of appeal accepted that the appellant was a sick man and that he required psychiatric treatment. However, the court observed that having regard to the serious nature of the offences committed, a period of imprisonment should nevertheless be imposed. The court also emphasised that prevention is one of the main objects of punishment, but emphasised that imprisonment should serve as a warning to others not to indulge in similar conduct.

41.6.11 In **S v B**⁶⁷ the court accepted that the accused had psycho-sexual problems in his marriage and that he needed treatment. Having regard to the special circumstances of the case the court imposed a term of imprisonment suspended on condition that he underwent treatment. In **S v D**⁶⁸ the court of appeal held that the magistrate erred in emphasising imprisonment of the accused as a means of removing him from contact with children. The court found that on the evidence it appeared that paedophilia was at least partially curable and incarceration was therefore not the only option. The court stated that the paedophile's sickness, by definition, leads to the commission of crimes against an extremely vulnerable segment of society. Thus, if there were no known form of treatment for paedophilia, then incarceration would be the only option to safeguard children from a paedophile's predations.

41.6.12 **S v D**⁶⁹ involved sexual abuse of children within the family context. The court observed that this conduct is often a manifestation of family pathology which requires that attention be given to the family, its composition and dynamics. Furthermore, in a criminal justice system a sentence should also address the future. Of importance is the court's observation that the sexual molestation of children represents a special form of criminal conduct. The person imposing sentence should beg the question both as regards the particular

⁶⁶1977 3 SA 830 (A).

⁶⁷1980 3 SA 851 (A).

⁶⁸1989 4 SA 209 (C).

⁶⁹1989 4 SA 709 (T).

individual the sentencer is dealing with as well as in regard to the interests of the community, whether it is possible to act in a reconstructive manner. The court set aside the sentence of imprisonment imposed by the magistrate and referred the matter back to the magistrate's court for reconsideration of sentence. The court of appeal also indicated that in the circumstances of the case it was far more likely that some or other form of compulsory treatment of the accused and the family under the sanction of a totally suspended sentence of imprisonment would be preferable.

41.6.13 In **S v E**⁷⁰ the trial court approached punishment for the indecent acts committed by the accused from the view that he needed urgent extra-custodial treatment, but because some term of imprisonment was unavoidable, it should be a short term so as not to delay the commencement of treatment unduly. On appeal the Appellate Division stated that the violation of the innocence of young children arouses the community's indignation and prompts it to call for measures to protect its youth. The penalties provided for therefore understandably reflect the seriousness with which the legislature viewed these contraventions. However, the obvious need to deter would-be offenders, and society's desire for retribution, must be balanced against the primary need in this type of case to achieve the offenders' rehabilitation in the long-term interest of society.

41.6.14 Finally, considering sentence in **S v R**,⁷¹ the Appellate Division highlighted the introduction of correctional supervision as a sentencing option and considered its appropriateness as a proper sentence for sexual offences. The court concluded that correctional supervision was a particularly appropriate sentence having regard to the circumstances of the case. The court held that as the accused had strong family ties and a stable job, his criminality had its origin in his personality defects which responded favourably to therapy, while imprisonment would have a negative impact on the accused. Although the offences were regarded as serious and the accused had a relevant previous conviction, the court was of the opinion that the sentence should emphasise remedial treatment rather than retribution.

41.6.15 It is clear from the above that, for some kinds of offences at least, the treatment model has a great deal of support in South Africa.

⁷⁰1992 2 SACR 625 (A).

⁷¹1993 1 SACR 209 (A).

41.7 **The move to mandatory minimum sentences**

41.7.1 The legislative framework for each sentencing option has been criticised as leaving too wide a discretion to the courts and, as a result, in the history of our penal system, a number of attempts were made to limit the sentencing discretion by providing for mandatory minimum sentences. By way of illustration, in 1952 the imposition of corporal punishment was mandatory under certain circumstances. In the same year imprisonment for the prevention of crime and imprisonment for corrective training were introduced, the imposition of which were compulsory if certain requirements were met. The **Abuse of Dependence-Producing Substances and Rehabilitation Centres Act**, 1971, for example, also contained a number of mandatory sentences.

41.8. **The Criminal Law Amendment Act 105 of 1997.**

41.8.1 The enactment of minimum sentencing provisions in the **Criminal Law Amendment Act 105 of 1997** followed heated debate on how to address perceptions that sentences imposed for rape are inadequate, both in terms of the deterrent and retributive functions of sentencing. The Act provides for, amongst other things, minimum sentences for certain serious offences such as murder and robbery. The provisions containing mandatory minimum sentences are only temporary and will cease to have effect after the expiry of two years from the commencement of the Act.⁷² However, the provisions may be extended by the President, with the approval of Parliament, for one year at a time.⁷³

41.8.2 In respect of rape, section 51 of the **Criminal Law Amendment Act 105 of 1997** provides that the High Court must, if it has convicted a person of rape committed under certain circumstances, sentence the person to imprisonment for life. These circumstances include incidents where the victim was raped-⁷⁴

- more than once, whether by the accused or by any co-perpetrator or accomplice;

⁷²Section 53(1) of the **Criminal Law Amendment Act 105 of 1997**. Section 51 commenced on 1 May 1998.

⁷³Section 53(2) of the **Criminal Law Amendment Act 105 of 1997**.

⁷⁴The circumstances are set out in Part I of Schedule 2 of the Act.

- by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
- by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions;
- by a person knowing that he has the AIDS or HIV virus; or
- under circumstances involving the infliction of grievous bodily harm.

41.8.3 In addition, this provision also applies where the victim -

- is a girl under the age under 16 years;
- is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
- is a mentally ill woman as contemplated in section 1 of the Mental Health Act 18 of 1973.⁷⁵

41.8.4 Where the High Court or a regional court has convicted a person of rape in circumstances other than those referred to above, the court must sentence the person -

- in the case of a first offender, to imprisonment for a period not less than ten years;
- in the case of a second offender, to imprisonment for a period not less than fifteen years;
- in the case of a third or subsequent offender, to imprisonment for a period not less than twenty years.⁷⁶

The operation of a sentence imposed in terms of the Act cannot be suspended.⁷⁷

41.8.5 However, if the court is satisfied that '*substantial and compelling*' circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it shall enter those circumstances on the record of the proceedings and may impose such lesser

⁷⁵Ibid.

⁷⁶Section 51(2)(b), read with Part III of Schedule 2, of the **Criminal Law Amendment Act 105 of 1997**.

⁷⁷Section 51(5) of the **Criminal Law Amendment Act 105 of 1997**.

sentence.⁷⁸ As pointed out by Du Toit *et al*⁷⁹ the legislature has not defined ‘substantial and compelling circumstances’. These will obviously be circumstances which are material to the offence, the interests of society or the personal circumstances of the accused person. The circumstances will be material in that it substantially affects the question of sentence and constitutes material mitigation. ‘Compelling’ can also be defined as convincing, in other words circumstances which bring the court to a decision or convince the court that circumstances or facts exist which justify the imposition of a lesser sentence than the prescribed sentence.

41.8.6 There is no onus on the accused person to prove the presence of substantial and compelling circumstances, or on the State to prove the absence of such substantial and compelling circumstances. There rests, according to Du Toit *et al*,⁸⁰ a clear duty on the accused or the defence to produce evidence in order to compel or convince the court that circumstances exist which justify the imposition of a lesser sentence.

It stands to reason that such substantial and compelling circumstances may also be inferred or be present in the State case or in evidence presented by State witnesses or by the prosecution itself. If no factual basis is laid for finding that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it follows that the court will be obliged under the statutory provisions to impose the prescribed sentence. After having considered the evidence on the merits and such evidence as is presented by the accused and the prosecution in respect of sentence, it is the duty of the court to enter into the record each and every circumstance which it finds to constitute substantial and compelling circumstances justifying a lesser sentence.⁸¹

41.8.7 Due to the fact that these provisions were enacted relatively recently, no comprehensive body of jurisprudence has developed on the interpretation of the sections. However, as the following case law will illustrate, difficulties are faced by courts, *inter alia*, with the concept of ‘substantial and compelling circumstances’ as used in section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997.⁸²

⁷⁸Section 51(3)(a) of the **Criminal Law Amendment Act 105 of 1997**.

⁷⁹**Commentary on the Criminal Procedure Act 28-16C**.

⁸⁰*Ibid*.

⁸¹Du Toit *et al* **Commentary on the Criminal Procedure Act 28-16C**.

⁸²Other difficulties relate to the question of whether the regional courts have retained jurisdiction to try the offences listed in Part 1 of Schedule 2 (see, for instance **S v Ibrahim** 1999 (1) SACR 106 (C); **S v Mdatjiece Eric** (unreported, judgment handed down on 30 September

41.8.8 At the one end of the spectrum, there is the unreported judgment given by Leveson J in **S v Majalefa and Another**⁸³ where the learned Judge held:

I am of the opinion that the expression “substantial and compelling circumstances” was intended to denote factors of solid material significance in relation to all the other component factors which must irresistibly be taken into consideration for the purpose of sentence ... The sentence must not lead to an injustice. For example, if the period of imprisonment is excessive because a material factor, weighty when considered against other factors in the enquiry on sentence, has not received appropriate attention. I think on this basis that the sentencing process will be the same as it was before the passing of the new Act. It will not be for the Court to start with the proposition but because the Legislature has so enacted, life imprisonment is automatically to be ordained, unless some mitigating factor is seen to exist. Instead, in my opinion, the starting point will still be a consideration of all the factors relevant to the passing of sentence. Proper consideration should be given to the well-known triad of factors, as dealt with in *Zinn’s* case.

41.8.9 At the other end of the spectrum, there is the interpretation given by Stegmann J in **S v Mofokeng and another**⁸⁴ where the learned Judge said:⁸⁵

Therefore, I consider it to be clear enough that, for ‘substantial and compelling circumstances’ to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that it can be rightly be described as ‘compelling’ the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.

and⁸⁶

1998 in the TPD); **S v Budaza** 1999 (2) SACR 491 (ECD); **S v Mangesi** 1999 (2) SACR 570 (ECD)); whether the Act has retroactive effect and applies to offences committed before the Act came into operation (see, in this regard, **S v Willemse** 1999 (1) SACR 450 (C); **S v Mofokeng and another** 1999 (1) SACR 502 (WLD)); and issues relating to the constitutionality of the provisions (**S v Budaza** (supra) - separation of powers; **S v Hendrik Jansen** (as yet unreported, Case no 668/99, judgment of Davis J in the CPD) - arbitrary nature of mandatory sentences and cruel and unusual punishment).

⁸³WLD case no 365/98, delivered on 22 October 1998.

⁸⁴1999 (1) SACR 502 (W). This decision was approved by Jordaan AJ in **S v Segole and another** 1999 (2) SACR 115 (W).

⁸⁵At 523c-d.

⁸⁶At 524c-d.

As I understand this legislation, ‘substantial and compelling circumstances’ must be factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2.

41.8.10 Somewhere between these two ends lies the test propounded by Squires J in **S v Madondo**⁸⁷ where he said:

If the prescribed sentence was so inappropriate that no reasonable court would have to impose it, that would necessarily mean that there are compelling reasons not to do so.

41.8.11 This approach finds support in recent decisions of Full Benches of the Namibian High Court⁸⁸ and the Witwatersrand Local Division.⁸⁹ In **S v Blaauw**⁹⁰ Borchers J also attempts to find some middle ground. The learned Judge held:⁹¹

Section 51(1) read with s 51(3) does not create a mandatory sentence, for a measure of discretion is permitted to the Court to find that substantial and compelling circumstances exist which justify the imposition of a sentence less severe than that of life imprisonment. This discretion is narrower than that permitted in earlier legislation where the finding of mere ‘circumstances’ was sufficient to justify departure from a prescribed sentence. The Legislature has not seen fit to describe what factors may or may not be considered, consequently a Court is, in my view, still able to have regard to all the factors which would traditionally have been considered in imposing sentence. Moreover, in my view, a Court should not consider each factor in isolation but view them cumulatively and if, in doing so, the Court forms the view that, bearing in mind all the factors, aggravating as well as mitigating, a sentence of life imprisonment would be grossly disproportionate to the crime committed or, to put it differently, startlingly inappropriate or offensive to its sense of justice, then it should find that substantial and compelling circumstances exist for departing from the prescribed sentence of life imprisonment. I do not believe that in such circumstances a Court would be substituting its own discretion for that of the Legislature, for I do not believe that the Legislature intended that unfair or grossly disproportionate sentences should be imposed.

⁸⁷Unreported, case no CC22/99, delivered on 30 March 1999 in the NPD.

⁸ **S v Vries** 1996 (2) SACR 638 (Nm); **S v Likuwa** 1999 (2) SACR 44 (Nm).

⁸⁹See **S v Blaauw** 1999 (2) SACR 295 (W) at 311e - i; **S v Homareda** 1999 (2) SACR 319 (W) at 323 c and g.

⁹⁰1999 (2) SACR 295. See also the judgment of Willis J in **S v Dithotze** 1999 (2) SACR 314 (W).

⁹¹At 311 e - i.

41.8.12 Other courts have formed different views on what will constitute substantial and compelling circumstances.⁹² One judge⁹³ found “exceptional circumstances,” which justified him not imposing the minimum prescribed sentence, not in the personal circumstances or conduct of the accused, but rather in the previous sexual history of the two minor victims as they had a sexual history and the one had “been naughty and had sex with someone else a few days before”.⁹⁴ In this case the accused was convicted on two counts of raping minors, nevertheless the minimum sentence was not imposed.

41.8.13 The difficulties experienced at a practical level with the implementation of sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997 are also highlighted in a submission received from **Adv Rita Blumrick** of the Office of the Director of Public Prosecutions: KwaZulu / Natal.⁹⁵ She says:

In practice the majority of Regional Court Magistrates interpret section 52(1) of Act 105 of 1997 as giving them a discretion as whether or not to refer matters to the High Court for sentence. If, ‘in his opinion’ the accused does not merit punishment in excess of the jurisdiction of the regional court, he refuses to stop proceedings and proceeds to sentence himself.

This leads to the ludicrous situation where, a Judge of the High Court, shall sentence an accused to life unless ‘substantial and compelling circumstances exist which justify the imposition of a lesser sentence’ yet a Regional Court Magistrate merely exercises his ‘opinion’.

In practice, despite the fact that no provision is made for Regional Courts to sentence an accused convicted of an offence referred to in Part I of Schedule 2, the overwhelming number of Magistrates interpret section 52(1) of Act 105 of 1997 as allowing them to sentence.

I suggest that section 52(1) be amended as a matter of urgency to stipulate that after conviction of an offence referred to in Part I of Schedule 2, the Regional Court shall stop the proceedings and commit the accused for sentence by a High Court.

⁹²See for instance **S v Cimane** (unreported judgment of Jones J delivered on 28 April 1999 in the Eastern Cape Division).

⁹³Per Judge Kotze in the High Court of the Free State in the unreported case of the **State v Boesman Mahamotsa** Case No 29/99.

⁹⁴at p 11.

⁹⁵Dated 8 November 1999.

41.8.14 Sadly, besides the absurdities and inconsistent application, the introduction of the **Criminal Law Amendment Act** 105 of 1997 has not brought about universal drastic increases in sentences imposed for rape, as the Legislature has intended.⁹⁶ Perhaps the case that illustrates this best is the highly publicised⁹⁷ judgment of Foxcroft J in **S v Bernard Abrahams**.⁹⁸ Foxcroft J sentenced the accused to seven years imprisonment for raping his fourteen year old daughter. The minimum sentence, as we have seen, prescribed by the Criminal Law Amendment Act for such an offence is life imprisonment. The court used its discretion to impose the lesser sentence because it was satisfied that ‘substantial and compelling circumstances exist which justify the imposition of a lesser sentence’. The circumstances relate to the fact that the accused was 54 years old, had no prior convictions, and because the court was not ‘satisfied that this offence is one of the worst cases of rape’⁹⁹ (in comparison to other rape cases where life imprisonment was not imposed by the Appeal Court despite the fact that far more physical violence were used and despite the fact that the consequences for the victims were far more serious).

41.8.15 In **S v Hendrik Jansen**¹⁰⁰ Davis J also found as a compelling and substantial circumstance the fact that the medical evidence revealed little violence in the rape of a nine year old girl.¹⁰¹ It is not clear from the judgment what the relationship between the girl and the accused was. Other considerations taken into account were the fact that the accused pleaded guilty, that he was a first offender and that he was 26 years old. The learned Judge imposed a sentence of 18 years imprisonment.

⁹⁶See also the remarks made by Borchers J in **S v Blaauw** 1999 (2) SACR 295 (W) at 311 i - j on the purpose of the Legislature in this regard.

⁹⁷The judgment made newspaper headlines. See, for instance, ‘Rape sentence slammed’ **Pretoria News**, 12 November 1999, p. 1; ‘Ginwala: We will not grill judge’ **Citizen**, 14 October 1999, p. 1; ‘Foxcroft’s rape sentence is seriously flawed’ **Sunday Times**, 17 October 1999, p. 26.

⁹⁸Unreported, case no 88/9/99, High Court, Cape of Good Hope Provincial Division.

⁹⁹Own translation.

¹⁰⁰CPD case no 668/99, judgment delivered on 21 June 1999, not yet reported.

¹⁰¹At page 19 of the judgment: ‘In short the medical evidence would classify this case as a borderline rape. In my view, this is a substantial and compelling circumstance which compels a move away from a statutorily prescribed sentence of life imprisonment’.

41.8.16 In **S v Madondo**,¹⁰² on the other hand, a sentence of life imprisonment was imposed upon a 43 year-old man who raped a 15 year-old girl, who was the daughter of his lover. The girl was not a virgin and showed no signs of any physical injury, although she did harbour feelings of anger and resentment against the accused. Interestingly enough, the accused pleaded guilty.

41.8.17 It remains to be seen whether the minimum sentence approach prescribed in terms of section 51 of the **Criminal Law Amendment Act 105** of 1997 will be the answer to the wave of serious offences threatening to engulf South Africa as past experience in obligatory sentencing or prescribed minimum sentences was not a great success.¹⁰³ However, there is no question that strict sentencing is required in order to stem the ever increasing wave of serious and more particularly violent sexual offences.

41.9 **The sentencing of sexual offenders in comparative legal perspective**

41.9.1 The idea of minimum sentences is not new or peculiar to South Africa. Since 1975 mandatory sentencing laws have been the most popular sentencing innovation in the United States of America.¹⁰⁴ By 1983, 49 of the 50 states (Wisconsin was the holdout) had adopted mandatory sentencing laws for offences other than murder or drunk driving. By 1994, every state in the United States had adopted mandatory penalties; most had several. Most mandatory sentences apply to murder or aggravated rape, drug offences, felonies involving firearms, or felonies committed by persons who have previous felony convictions. Between 1985 and mid-1991, the U. S. Congress enacted at least 20 new mandatory penalty provisions; by 1991, more than 60 federal statutes defined more than 100 crimes subject to mandatories.¹⁰⁵

¹⁰²The unreported judgment of Squires J in case no CC22/99, Natal Provincial Division.

¹⁰³Du Toit et al **Commentary on the Criminal Procedure Act 28-16D**: 'Short term measures such as s 51 of Act 105 of 1997 would probably not constitute a full answer to such serious problems'.

¹⁰⁴See also Michael Tonry **Sentencing Matters** New York: Oxford University Press 1996 p. 134 et seq.

¹⁰⁵U. S. Sentencing Commission **Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System** Washington D. C., U. S. Sentencing Commission 1991 p. 8 - 10.

41.9.2 Interesting enough of the US position is the US Federal Guidelines on sentencing. These Guidelines are based on a grid system. Each type of criminal offence is given a value or level, with the base level increased if there are aggravating factors. There are 43 rows of offence levels. There are a further six columns for different criminal history point totals. The intersection of the column and the rows indicates a sentencing range which establishes a minimum and maximum sentence. This system, and similar ones to it, create more certainty for sentencers and those involved in the criminal justice system. However, the difficulties in ranking offences and punishments means that these types of mathematical gradings do not work and are highly likely to cause injustice in individual cases.

41.9.3 Many other countries have passed mandatory sentences legislation. The United Kingdom, for instance, recently adopted the **Crimes (Sentences) Act 1997** wherein elaborate provision is made for mandatory and minimum custodial sentences. It provides, *inter alia*, for a mandatory life sentence for persons convicted for 'second serious offences'. This includes rape and murder. The following special provision is made in this Act for sexual offenders:

20. - (1) Subsection (2) below applies where-

- (a) there is released under this Chapter an offender who has been sentenced to imprisonment for a term in respect of a sexual offence committed after the commencement of this Chapter; and
- (b) the court by which he was so sentenced gave a direction under subsection (3) below.

(2) Section 16¹⁰⁶ above shall have effect in relation to the offender as if-

- (a) in subsection (1), paragraph (c) and, in paragraph (a), the words "of twelve months or more" were omitted; and
- (b) for subsection (2) there were substituted the following subsection-

"(2) On his release, the offender shall be subject to a release supervision order-

- (a) where he is released otherwise than under section 10¹⁰⁷ above, for such period as is specified in the direction under section 20(3) below;
- (b) where he is released under section 10 above, for a period equal to the aggregate of-
 - (i) the period mentioned in paragraph (a) above; and
 - (ii) the period equal to so much of the remainder of his term as he would have been liable to serve but for his release under section 10 above;

¹⁰⁶Section 16 deals with release supervision orders.

¹⁰⁷This section regulates early release on compassionate grounds.

- and in applying paragraph (b) above account shall be taken of any early release or additional days awarded to the offender before his release."
- (3) Where a court sentences an offender to imprisonment for a term in respect of a sexual offence committed after the commencement of this Chapter, it shall give a direction under this subsection unless it is of the opinion that there are exceptional circumstances which justify its not doing so.
 - (4) Where the court does not give a direction under subsection (3) above, it shall state in open court that it is of that opinion and what the exceptional circumstances are.
 - (5) A direction under subsection (3) above shall direct that the offender's release supervision period shall be such period as is specified in the direction.
 - (6) The period so specified shall be-
 - (a) a period equal to 50 per cent of the offender's term of imprisonment (rounded up to the nearest whole day) or a period of twelve months, whichever is the longer; or
 - (b) if the court considers a longer period necessary for the purpose of preventing the commission by the offender of further offences and of securing his rehabilitation, such longer period, not exceeding ten years, as it may determine.

41.9.4 Even more interesting is the UK **Crime and Disorder Act** 1998. In terms of this Act, the police may apply, for instance, for a 'sex offender order' to a court if the following conditions are met:

- the person against whom the order is requested is a sex offender;¹⁰⁸ and
- that person has acted in such a way as to give reasonable cause to believe that a sex offender order is necessary to protect the public from serious harm from that person.¹⁰⁹

41.9.5 Should these conditions be met, the court may make an order prohibiting the defendant from doing anything described in that order provided that the prohibitions are those necessary for the purpose of protecting the public from serious harm from the sexual

¹⁰⁸A 'sex offender' is defined in the Act (sections 3(1) and 21(1)) as a person who has been convicted of a sexual offence; has been found not guilty of such an offence by reason of insanity, or found to be under a disability and to have done the act charged against him in respect of such an offence; has been cautioned in respect of such an offence which, at the time when the caution was given, he had admitted; or has been punished under the laws of another country for a similar sexual offence.

¹⁰⁹Sections 2(1) and 20(1) of the **Crime and Disorder Act** 1998.

offender.¹¹⁰ The minimum duration of a sex offender order is five years.¹¹¹ Breach of such order causes the sexual offender to be liable for imprisonment or to a fine, or to both.¹¹²

41.9.6 The UK **Crime and Disorder Act** 1998 also provides for the extension of sentences¹¹³ for license purposes.¹¹⁴ This applies where a court which proposes to impose a custodial sentence for a sexual or violent offence, considers that the period for which the offender would be subject to licence would not be adequate for the purpose of preventing the commissioning by him or her of further offences and securing his or her rehabilitation. The extension period must not exceed ten years in the case of a sexual offence and five years in the case of a violent offence.¹¹⁵ In terms of the Act, the effect of an extended sentence is that the term of the extended sentence is deemed not to include the extension period.¹¹⁶ Where prisoners are released, they are released on licence and the licence remain in force until the end of the extension period.

41.9.7 The **Crime and Disorder Act** 1998 also empowers a sentencing court to make a drug treatment and testing order.¹¹⁷ Such order must include a requirement that the offender submit to treatment by or under the direction of a suitably qualified treatment provider with a view to the reduction or elimination of the offender's dependency on or propensity to misuse

¹¹⁰Sections 2(3) and (4) and 20(3) and (4) of the Crime and Disorder Act 1998.

¹¹¹Sections 2(7) and 20(7) of the Crime and Disorder Act 1998.

¹¹²On summary conviction, to imprisonment for a term not exceeding six months; on conviction on indictment, to imprisonment for a term not exceeding five years: sections 2(8) and 20(8) of the **Crime and Disorder Act** 1998.

¹¹³An 'extended sentence' is a custodial sentence the term of which is equal to the aggregate of the term of the custodial sentence that the court would have imposed and a further period for which the offender is to be subject to a license and which is of such length as the court considers necessary for the purpose of preventing the commission of further offences and securing rehabilitation: Section 58(2) of the **Crime and Disorder Act** 1998.

¹¹⁴Sections 58 and 86.

¹¹⁵Section 58(4) of the **Crime and Disorder Act** 1998.

¹¹⁶Section 59 of the **Crime and Disorder Act** 1998.

¹¹⁷In terms of section 61.

drugs.¹¹⁸ The order must further include a requirement that the offender must submit to testing.¹¹⁹

41.9.8 Sex offenders in the United Kingdom are also subject to notification requirements in terms of the **Sex Offenders Act** 1997. A person who is subject to the notification requirements must notify the police of the following information:¹²⁰

- date of birth;
- name and name changes; and
- home address and any changes of home address.

41.9.9 A sexual offender remains subject to the notification requirements for an indefinite period¹²¹ where he or she has been sentenced to imprisonment for life or for a term of 30 months or more. Failure to comply subjects the sex offender to criminal liability.¹²²

41.9.10 In addition, courts in the United Kingdom regularly publish 'guideline judgments'. One such widely publicised judgment, **Attorney-General's Reference No. 1** of 1989,¹²³ indicates that a man convicted of incest with a girl under 16 must expect to go to prison for at least two years unless the circumstances are quite exceptional.

¹¹⁸Section 62 of the **Crime and Disorder Act** 1998.

¹¹⁹Section 62(4) of the **Crime and Disorder Act** 1998.

¹²⁰Section 2 of the **Sex Offenders Act** 1997.

¹²¹Other periods apply for shorter sentences: See section 1(4) of the **Sex Offenders Act** 1997.

¹²²Section 3 of the **Sex Offenders Act** 1997.

¹²³[1989] 1 WLR 1117, but see **Attorney-General's Reference No. 4 of 1989** [1990] 1 WLR 41.

41.9.11 There are no prescribed mandatory minimum prison terms for offenders in the Australian Capital Territories (ACT) except for certain traffic offences.¹²⁴ However, certain maximum penalties are prescribed for sexual assault offences in the ACT. These are:

Sexual assault offences	Section in Crimes Act 1900	Maximum penalty
Sexual assault in the first degree: ¹²⁵ alone in company	92A (1) 92A (2)	17 years 20 years
Sexual assault in the second degree: alone in company	92B (1) 92B (2)	14 years 17 years
Sexual assault in the third degree: alone in company	92C (1) 92C (2)	12 years 14 years
Sexual intercourse without consent: alone in company	92D (1) 92D (2)	12 years 14 years
Sexual intercourse with a young person: child under 10 years child 10 - 16 years	92E (1) 92E (2)	17 years 14 years
Maintaining a relationship with a young person: person under 16 years person under 16 years and the defendant is found, during the relationship, to have committed another sexual offence against the young person (whether or not the defendant has been convicted of that offence)	92E (2) 92E (6)	7 years If the penalty for the other offence is less than 14 years, 14 years. If the penalty for the other offence is 14 years or more, life.

41.9.12 The ACT penalties for incest offences are as follows:

¹²⁴For an interesting comparison between sentences imposed for rape and robbery on an inter-jurisdictional level, see Kate Warner 'Sentencing sexual offenders in the UK and Australia' unpublished paper delivered at the Centre for Sentencing Research, University of Strathclyde, Glasgow on 24 to 26 June 1999.

¹²⁵'First degree' sexual assault is that involving grievous bodily harm.

Incest offences	Section in the Crimes Act 1900	Maximum penalty
Incest with a child under 10 years	92L (1)	20 years
Incest with a person 10 - 16 years	92L (2)	15 years
Incest with a person over 16 years	92L (3)	10 years

41.9.13 Sentencing by the ACT courts has come under fire, particularly in relation to sexual assault offences. The common criticisms are:¹²⁶

- there is insufficient statutory guidance to the courts in sentencing;
- there is an unjustified disparity in the sentences imposed by the courts for sexual offences; and
- the sentences imposed are too lenient and are 'out of touch' with community attitudes.

41.9.14 Victoria (Australia) recently enacted the **Sentencing (Amendment) Act**, 1993, which provides for indefinite sentences for 'serious sexual offenders'. Section 4 of this section defines 'serious sexual offender' as someone who has been convicted of two or more sexual offences for which he or she has been sentenced to a term of imprisonment or detention, or as someone who has been convicted of at least one sexual offence and one violent offence arising out of the one course of conduct for which he or she had served a term of imprisonment. Section 5A states that in sentencing serious sexual offenders, the court must regard the protection of the community from the offender as the **principal** purpose for which the sentencing is imposed. In order to achieve this purpose the court may impose a longer sentence than is proportionate to the gravity of the offence. Further, under the new amendments, the courts may impose an indefinite sentence in respect of serious sexual offences. These sentences may be imposed on either the court's initiative, or on an application made by the Director of Public Prosecutions.¹²⁷ These provisions are based on the idea that future dangerous behaviour can be predicted. As such, these provisions offend against the notion that punishment should be just and proportionate to the crime committed. Even so, it

¹²⁶Community Law Reform Committee of the Australian Capital Territory **Discussion Paper No. 4: Sexual Assault** Canberra September 1997 p. 143 et seq.

¹²⁷Section 18A of the **Sentencing (Amendment) Act** 1993.

is often argued that in the interests of community safety, repeat offenders ought to be incarcerated or detained for indefinite periods.¹²⁸

41.10 **Truth in sentencing**

41.10.1 'Truth in sentencing', a term contained in provisions of the US **Violent Crime Control and Law Enforcement Act**, 1994, that grants funds to states for expansion of prison bed capacity, is a concept that has roots in two distinct streams of American criminal justice reform. Proponents of structured sentencing guidelines view 'truth in sentencing' as an necessary instrument for establishing clarity, consistency and certainty in the duration of prison terms to be served by offenders. Outside of this context, however, 'truth in sentencing' has been espoused by many advocates engaged in a highly politicised campaign for more punitive national crime-control strategy.¹²⁹

41.10.2 Truth in sentencing has become a popular catch phrase of most governments in recent times. It has been called 'the latest in a rash of modern sentencing phenomena'¹³⁰ and emphasises certainty in sentence lengths. It is supposed that sentences are more 'truthful' the narrower the gap is between the sentence imposed by the Court and the actual time served by the convicted person. 'Truth in sentencing' has been seen as political response to the community's loss of faith in strategies to reduce crime. The focus in 'truth in sentencing' is solely on punishment.¹³¹

¹²⁸Community Law Reform Committee of the Australian Capital Territory **Discussion Paper No. 4 Sexual Assault** Canberra, September 1997, par. 738.

¹²⁹Judy Green 'Getting tough on crime: The history and political context of sentencing reform developments leading to the passage of the 1994 Crime Act' Paper delivered at the International Conference on Sentencing held at the University of Strathclyde, Glasgow on 24 - 26 June 1999.

¹³⁰P Sallmann **In Search of the Holy Grail in Sentencing: An Overview of Some Recent trends and Developments** 134.

¹³¹See also Brian J Ostrom and Charles W Ostrom 'The impact of truth-in-sentencing legislation in Virginia' Paper delivered at the International Conference on Sentencing held at the University of Strathclyde, Glasgow on 24 - 26 June 1999.

41.10.3 New South Wales introduced its **Sentencing Act** (the 'truth in sentencing' legislation) in 1989. This piece of legislation abolished the remission system and replaced it with a system whereby courts impose a minimum sentence and then add on one-third of that sentence as a possible parole period. Other jurisdictions have followed the example of New South Wales, with the Northern Territories (Australia) introducing the **Sentencing Bill** in 1995. This Bill provides for the abolition of remissions and for non-parole periods where the minimum of 50% of the head sentence must be served (70% for rapists), and that sentences less than 12 months in duration must be fully served.

41.10.4 Similarly, under the goal of achieving 'truth in sentencing' the **Victoria Corrections (Remissions) Act** 1991 abolished remissions. However, section 10 of this Act directed the judiciary to adjust the length of custodial sentences downwards to ensure that this would not result in the offender spending more time in custody than he or she would have done prior to the abolition of remissions. This section was modified by an amendment in 1993 which provided that this downward adjustment was not to apply when sentencing a serious sex offender or a serious violent offender.

41.10.5 Since 'truth in sentencing' has been introduced, the number of prisoners in jails has increased dramatically. This has been brought about through an increase in overall sentence periods, with prisoners serving a much longer prison sentence than in the past. This in turn has led to overcrowding, and increased strain on the public purse. For instance, the New South Wales government has since 1989 approved funding for the construction of three new prisons.

41.11 **Sentencing procedures**

41.11.1 The procedures to be followed after conviction and the order in which various presentations are made have largely evolved over time and is partly prescribed in the **Criminal Procedure Act**, 1977. Immediately after conviction the State may prove previous convictions, if any. Thereafter the defence and the State will get the opportunity to address the court on sentence (often by way of *ex parte* statements from the bar) about issues and facts relevant to sentencing. In practice, the defence is given the opportunity to address the court first and the State follows. In general the courts allow the parties considerable leeway in the presentation of evidence and address on sentencing and are not too dogmatic and strict in this regard.

41.11.2 The above procedure is not formulated in legislation and the Project Committee on Sentencing is recommending that sentencing procedure be prescribed in the following manner:¹³²

41.12 **Procedure after conviction**

- (1) Immediately after a person has been convicted and before sentence has been imposed the prosecution may produce to the court for admission or denial by the person concerned a record of previous convictions alleged against such person.
- (2) The court must ask the person concerned whether any previous conviction referred to in subsection (1) is admitted.
- (3) If the person concerned denies such previous conviction, the prosecution may tender evidence that such person was so previously convicted.
- (4) If the person concerned admits such previous conviction or such previous conviction is proved the court must, subject to the provisions of section 15,¹³³ take such conviction into account if it is relevant to the offence for which the accused must be sentenced.
- (5) If the prosecution tenders no evidence of a previous conviction the court may nevertheless receive evidence to prove such conviction.

41.12.1 In its discussion paper, the Project Committee on Sentencing also points out that the **Criminal Procedure Act**, 1977, contains a number of provisions dealing with previous convictions.¹³⁴ The Project Committee on Sentencing is of the view that similar provisions should be enacted in the **Sentencing Act**. The Project Committee on Sentencing therefore recommends that provisions be made for proof of previous convictions, the lapsing of previous convictions, fingerprint register as proof of previous convictions, evidence on further particulars in respect of previous convictions, and the expungement of a person's criminal record.

¹³²Clause 12 of the draft Sentencing Bill.

¹³³In terms of this clause of the draft Sentencing Bill, convictions will fall away as previous convictions after 10 years.

¹³⁴See, for instance, section 271 of the **Criminal Procedure Act** 1977 which permits the prosecution to prove previous convictions against an accused upon conviction; section 274 of the same Act which provides that a court may before passing sentence receives such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed..

41.12.2 In the light of the work done by the Project Committee on Sentencing, the Project Committee on Sexual Offences decided to refrain from making proposals in respect of sentencing procedures.

41.12.3 In their report, the Project Committee on Juvenile Justice deals extensively with the confidentiality and expungement of criminal records.¹³⁵ Clause 115 of the proposed draft Bill provides that any conviction and sentence imposed upon a child convicted of any serious offence¹³⁶ may not be expunged. In respect of other offences, the presiding officer, at the time of sentencing the child, must also make an order regarding the expungement of the record of the child's conviction and sentence. The presiding officer must note reasons for the decision as to whether such record may be expunged, and if it is decided that the record should not be expunged, such decision is subject to review or appeal.

41.12.4 In the light of the recommendations made by the Project Committee on Juvenile Justice on expungement of records of child offenders, the Project Committee on Sexual Offences decided to refrain from making proposals in this regard.

41.13 The sentencing of child sexual offenders

41.13.1 The sentencing of child offenders is elaborately regulated in the proposed Child Justice Bill prepared by the Project Committee on Juvenile Justice.¹³⁷ In terms of this Bill, the purposes of sentencing children is to encourage the child to be accountable for the harm caused by the child; to promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence; to promote the reintegration of the child into the family and community; and to ensure that any necessary supervision, guidance, treatment or services which forms part of the sentence can assist the child in the process of reintegration.¹³⁸ However, the Child Justice Bill has a general focus and does not deal with the child sexual offender in particular. The first question to be posed is therefore whether the position of the child sexual offender is so different

¹³⁵Chapter 13 of the Report on Juvenile Justice.

¹³⁶Listed in Schedule 3 of the draft Youth Justice Bill.

¹³⁷See Chapter 9 of the Youth Justice Bill in the draft Report on Juvenile Justice, April 2000.

¹³⁸Clause 88 of the Youth Justice Bill.

from the ordinary child offender that when dealing with the child sexual offender special sentencing provisions are required.

41.13.2 At first glance this appears not to be the case. However, the Child Justice Bill should apply to all child offenders, child sexual offenders included. What could and should be done, however, is to give the specialised sexual offences courts additional powers to make orders to best suit the circumstances of the child sexual offender. Examples from a comparative legal perspective of such powers and orders are discussed briefly in the subsequent paragraphs.

41.13.3 In the United Kingdom, the court may make a **parenting order** in respect of a person who is a parent or guardian of a child or young person convicted of an offence or in respect of whom an anti-social behaviour order or sex offender order has been made.¹³⁹ A parenting order is an order which requires the parent or guardian to comply, for a period not exceeding 12 months, with such requirements as are specified in the order, and to attend, for a certain period, such counselling or guidance sessions as may be specified. The underlying rationale for a parenting order is that it must be desirable in the interests of preventing any repetition of the kind of behaviour which led to the child safety order, anti-social behaviour order or sex offender order being made and the commission of any further offence¹⁴⁰ by the child or young person. **There seems to be considerable merit to actively involve parents and guardians in the treatment and rehabilitation of their children who commit offences by means of a parenting order.**

41.13.4 In terms of the UK **Crime and Disorder Act** 1998, a court may make a **child safety order** with respect to a child under the age of ten years.¹⁴¹ Such order places the child for a certain period¹⁴² under the supervision of a social worker or a member of a youth offending team and requires the child to comply with such requirements as are specified in the order. The conditions for such order are that the child must have committed an act which, if the child had

¹³⁹Section 8(2) of the **Crime and Disorder Act** 1998.

¹⁴⁰This includes failure to comply with a school attendance order or failure to secure regular attendance at school of a registered pupil in terms of the UK **Education Act** 1996.

¹⁴¹Section 11(1) of the **Crime and Disorder Act** 1998.

¹⁴²Three months, or where the court is satisfied that the circumstances of the case are exceptional, twelve months.

been aged ten or over, would have constituted an offence; that the order is necessary for the purposes of preventing the commission by the child of such act; that the child has contravened a ban imposed by a curfew notice; and that the child has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself or herself.

41.13.5 The Child Justice Bill proposed by the Project Committee on Juvenile Justice determines ten years as the minimum age for prosecution.¹⁴³ Should this proposal (which we support) be adopted, then nothing theoretically prevents us from proposing the introduction of child safety orders. The only concern is that if a child under ten does not have the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation, then surely it makes no sense to expect such child to comply with the requirements of a child safety order. **In our opinion, the focus should fall on the child and the order should be addressed to the social worker (or member of the child justice team) to ensure that the child receives the necessary support and guidance. The needs of these children need to be taken into account and catered for. In addition, a Children's Court enquiry should be held for children under ten years of age, or where appropriate, with the onus being placed on the care-giver to explain how the child came to be in the position to commit criminal acts.**

41.13.6 However, a court in the United Kingdom may not make a parenting order or a child safety order unless it has been notified by the Secretary of State that arrangements for implementing such orders are available in the area in which it appears that the child resides or will reside.¹⁴⁴

41.13.7 Section 14 of the UK **Crime and Disorder Act** 1998 also provides for **local child curfew schemes**. In terms of this provision a local authority may impose a ban on children below the age of ten years to be in a public place during specified hours¹⁴⁵ or otherwise than under the effective control of a parent or a responsible person older than 18 years. Where a child contravenes a curfew imposed, the police must inform the local authority that the child has

¹⁴³Clause 6.

¹⁴⁴Sections 8(3) and 11(2) of the **Crime and Disorder Act** 1998.

¹⁴⁵Between 9 pm and 6 am. The curfew notice, however, may specify different hours in relation to children of different ages: Section 14(6).

contravened the curfew¹⁴⁶ and the police may remove the child to the child's place of residence 'unless he (the police) has reasonable cause to believe that the child would, if removed to that place, be likely to suffer significant harm'. These provisions are quite far reaching and careful consideration should be given whether similar provisions should be introduced in South African law given the available resources and the sheer number of street children involved, to name but one category.

41.13.8 In New Zealand, section 28A of the **Criminal Justice Act 1985** empowers a court to make a **non-association order** where the offender is convicted of an offence punishable by imprisonment. Such order shall have the effect of prohibiting the offender from associating with any person or persons specified in the order or any person or persons of any class specified in the order.

41.14 **The sentencing of offenders who sexually abuse their own children (the 'incest cases')**

41.14.1 International¹⁴⁷ and South African research¹⁴⁸ show that the proportion of those convicted of a sexual offence such as rape or incest who receive immediate custody has risen significantly. Imprisonment for somebody convicted of sexual offences against children is likely to be a very unpleasant experience, because the bulk of the prison population share the general public's disgust and horror at child sexual abuse, and often demonstrates it by acts of violence. Thus there can be little doubt that the high chance of imprisonment if convicted is another very

¹⁴⁶The local authority must then launch an enquiry in terms of section the **Children's Act 1989**.

¹⁴⁷In the United Kingdom, the proportion of those convicted of incest who received immediate custody has risen from 71% in 1980 to 83% in 1987. The proportion of those convicted of sexual intercourse with girls aged under 13 increased from 54% to 85% over the same period. See Danya Glaser and JR Spencer 'Sentencing. Children's Evidence and Children's Trauma' [1990] **Crim. LR** 371 at 373.

¹⁴⁸Some recent South African research studies seem to indicate that the percentage of accused given custodial sentences and their mean effective number of years in prison (of those that went to prison) for rape were 95,2% and 7,2 years respectively. See the research conducted for the Project Committee on Sentencing by Ron Paschke and others.

powerful encouragement for perpetrators to deny the offence. On the other hand, the vast majority of child sexual abusers are either family members or acquaintances of the abused children.¹⁴⁹

41.14.2 Research has shown that the average age of abused children is ten years, with significant numbers coming to light before the age of seven.¹⁵⁰ Research has further shown that when child abuse comes to light, the majority of alleged abusers deny the abuse.¹⁵¹ The dichotomy is that the international experience shows that the overwhelming majority of those cases that do go to trial before the criminal courts for sexual offences against children are convicted on a plea of guilty.¹⁵² By and large, only those who admit the offence are prosecuted as in the face of a denial the probability of a successful prosecution diminishes significantly. At present, therefore, only a small proportion of declared cases of child sexual abuse result in a prosecution. This also seems to be the position in South Africa.

41.14.3 One reason for this low rate of prosecution is that the police and the Director of Public Prosecutions sometimes decide that a prosecution, although feasible, would do more harm than good. However, the main reason is that in many cases where prosecution is although desirable, not enough of the evidence is legally admissible to give the faintest chance

¹⁴⁹According to D Glaser and JR Spencer 'Sentencing, children's evidence and children's trauma' [1990] **Crim LR** 371 over 80% of children whose abuse is declared are either family members or acquaintances of the abused children and often have a caring role in relation to the abused child. This is in contrast to many offenders abusing and raping adults.

¹⁵⁰Haugaard and Repucci **The sexual abuse of children** (1988) Jossey-Bass.

¹⁵¹Glaser and Spencer [1990] **Crim LR** 371 at 372 refers to the Bexley experiment where 86% of suspected abusers denied the abuse in one scheme. See also 'Child Sexual Abuse Joint Investigative Programme - Bexley Experiment' (1987) HMSO 45.

¹⁵²Glaser and Spencer [1990] **Crim LR** 371 at 372 deduced the proportion of guilty pleas from the conviction rate. In rape, where the victims are adults as well as children, the conviction rate is around 70% in the United Kingdom. In incest, where nearly all the victims are children and young persons, the conviction rate is 98%. Bearing in mind the extreme difficulties that the law creates around the evidence of children, a 98% conviction rate for incest in the United Kingdom is only explicable by a very high proportion of guilty pleas. It must be borne in mind that this study does not include all reported cases, only those that go on to trial.

of securing a conviction, let alone the realistic prospect of conviction which ought to exist before it is considered proper to institute criminal proceedings. The difficulty is that in most cases of child sexual abuse there is very little evidence of what happened apart from the version of the child or a number of other children.¹⁵³ International research further shows that less than 50% of sexually abused children show any positive physical signs of abuse at the time of examination and even when these are present, usually only compatible with abuse, rather than positive proof of it.¹⁵⁴

41.14.4 By and large, the rules of criminal evidence makes it very difficult for the court to receive the evidence of children, and virtually impossible to convict on it even if it was available. A combination of the competency requirement and the rule against hearsay means that a criminal court hardly ever hears a child under the age of six years and rarely hears one under the age of ten years. Those who are heard are often left to be destroyed in cross-examination.

41.14.5 In practice this has in the past meant, and to a large extent still does mean, that the authorities cannot prosecute an accused for child sexual abuse unless he or she admits the offence, and thereby hands the prosecution a piece of high-quality legal ammunition in the form of a confession. There can be very little doubt that this fact strongly encourages perpetrators to deny the offence, or at least to refuse to admit it. When called in to advise a person who has been accused of a sexual offence on the version of a child and little else, any competent lawyer would advise his or her client to say nothing. If the client has previously been in this kind of trouble, he or she will not even need a lawyer to be told this.

41.14.6 From a child psychiatric point of view, one of the most important ameliorating factors for the abused child's subsequent mental health is the abuser's assumption of responsibility for what he or she has done, indicating the truth of the child's story and the fact that the abuser was to blame, not the child. The first step must be for the abuser to admit his or her abusive behaviour. As well as helping to alleviate some of the trauma to the child and the family, admission is also the step towards the possibility of treatment for abusers, which is

¹⁵³Sgori (ed) **Handbook of Clinical Intervention in Child Sexual Abuse** (1982) Lexington Books.

¹⁵⁴Muram 'Child sexual abuse: Relationship between sexual acts and genital findings' (1989) **Child Abuse and Neglect** 211.

probably the only option offering a real prospect of stopping the abuser from offending again. Thus, insofar as the rules of criminal evidence and the sentencing practices of the courts encourage abusers to deny the offence, they make the task of coping with the psychological after-effects and treatment much harder.

41.14.7 It must therefore be realised that there is also a downside to the move to impose more severe sentences, and longer prison sentences, in particular for those offenders who sexually violate children. This is very clearly illustrated by **Mr Johan Brits**, an attorney from Piketberg, who says:

... where [the perpetrator] occupies a position of such a nature relative to the child that the punishment of the perpetrator by the court at the same time involves unintentional punishment of the child, which in effect may affect the child more seriously than the crime itself, ... retribution works in reverse in the sense that the victim becomes victimised at the instance of the court.

... one often finds the situation that the abuser is also the financial provider of the family unit that contains the child. Should the provider be prosecuted then he could lose his employment because of the prosecution, or he could be sentenced for period of imprisonment in which case he will most probably lose his employment.

41.14.8 Where the child sexual abuse is followed by criminal proceedings, these often inflict further emotional damage on the child,¹⁵⁵ particularly where the person prosecuted is a close member of the family. There are three reasons advanced for this:¹⁵⁶

Firstly, there is the problem of delay, during which the child and the family spend anxious months uncertain about the abuser's ultimate plea and anticipating the prospect of the child having to give evidence in court. This latter factor may well preclude the possibility of offering treatment to the child, for fear of contaminating the child's evidence.

Secondly, if the case is fought to a finish she will have to give evidence, due to a combination of the hearsay rule, the 'oral tradition' and the need for cross examination. These currently require the child to retell the story, live, on the day of the trial and the process is likely to be a painful one. The child must be taken through the whole story again in excruciating detail in front of a set of strangers and this explicit reminder of the abuse can be extremely harrowing. This is then followed by cross-examination, in the course of which, whatever else happens, the child will be directly or indirectly accused

¹⁵⁵Goodman, Pyle et al 'Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims' (1989) Final report submitted to the USA National Institute of Justice, Grant no. 85-IJ-CX-0020.

¹⁵⁶Glaser and Spencer [1990] **Crim LR** 371 at 373 - 375.

of telling lies. Those who have worked with child victims who have given evidence often say the children find this the most shattering part of the courtroom experience. An adult witness may (or may not!) be able to understand the need for his evidence to be tested in this sort of way; but for many children it signifies that the adult world, having so far supported and believed them, has now rejected their story and turned against them.

Thirdly, the child may suffer deep distress when the outcome of the prosecution is that the abuser goes to prison. Although some children who have been sexually abused within the family hate their abuser, many hold ambivalent feelings towards him and others still love him and feel concern for him. These children usually wish the abuser to take responsibility for the abuse, but do not wish for him to go to prison. Finding themselves instrumental in the defendant's incarceration then further increases the child's sense of guilt, rather than affording relief in the safety the child has gained. Adding insult to injury, some children also find themselves facing the displeasure of the other members of their family for the disaster they are felt to have brought about. A prominent feature of British criminal justice is that the victim of the offences is officially a nobody: he cannot directly make his own views on sentence known to court, and the courts currently appear uninterested in them, even when offered by witnesses or as part of the social enquiry report, which is by no means always required. Children (and often their relatives who are expected to support them through the ordeal that follows disclosure of the offence) often find this failure to pay any attention to their declared wishes in relation to the abuser quite incomprehensible. Indeed, when it issues a custodial sentence, the court's apparent lack of response to the child's wishes is often perceived by the child as an extension of his or her powerlessness, of which the abuse had been a previous expression.

41.14.9 This exposition equally applies to the South African situation.

41.14.10 Changes in the law of procedure and evidence and movements in sentencing could combine to produce a worrying result. The changes to the law of procedure and evidence proposed in this Discussion Paper make it likely that more children will be called as witnesses. The question that remains is whether these proposals go far enough in removing those adverse factors which are harmful to these young witnesses who may well be victims too.

41.14.11 In the first place, the main motivation behind the proposed changes is the desire to see child sexual abusers prosecuted to conviction. The use of one-way mirrors, video cameras, an intermediary, etc. is partly intended to give the criminal courts more evidence provided by children to act on, and abolishing archaic rules of evidence such as the cautionary rules is solely intended to make it easier for the courts to convict once they have got it. Taken together, the changes are meant to result, and probably will result, in a larger proportion of child abusers appearing in the criminal courts. Part of the thinking behind the proposals is also the desire to reduce the stress a child witness suffers as a result his or her court appearance. If, however, the child still has to come to court to give evidence live, whether by means of a video

link-up or through a one-way mirror, this does nothing about two of the major causes of stress such a child face: the fact that the child is unable to begin the process of emotional recovery by putting the abusive events in the past until after the trial, and the fact that the child must still undergo a traditional cross-examination.¹⁵⁷

41.14.12 Secondly, the dominant trend in sentencing child abusers is towards more, longer and even mandatory prison sentences. This is also the international trend.¹⁵⁸ The courts, for their part, have been sending larger and larger numbers of convicted sexual offenders to prison, where the possibility for psychiatric treatment remains slim.¹⁵⁹ The increase in severity is presumably based on what is felt to be the public opinion, but surely it is insufficient to base this increase in maximum penalties on public opinion without empirical evidence to support it.¹⁶⁰ Whether or not they satisfy public opinion, current sentencing policies are likely to reinforce offenders in their denial and reduces motivation to plead guilty. This denial will counterbalance any tendency to admit, which could follow from the increased chances of conviction resulting from the facilitation of hearing children's evidence.

41.14.13 In short, the result, if we are not careful, could be an equal rate of denial on the part of offenders, a larger number of child abuse cases resulting in prosecutions, an increased proportion of 'not guilty' pleas among them, and many more children suffering emotional stress by waiting to give evidence, and by seeing those they might still love being sent to jail. The prospect is a most disturbing one, and perceived as such by many of the children who continue

¹⁵⁷See Chapter 40 on the Examination of Witnesses.

¹⁵⁸In the United Kingdom the **Sexual Offences Act** 1985 increased the maximum penalties for attempted rape from seven years to life and for indecent assault on a female from five or two years, depending on the age of the victim, to ten years whatever the age. The maximum penalty for child cruelty and neglect was raised in the United Kingdom from two years to ten years by section 45 of the **Criminal Justice Act**, 1988.

¹⁵⁹See Chapter 43 on the Treatment of Sexual Offenders.

¹⁶⁰For instance, a 1988 survey of public attitudes in Melbourne, Australia showed a minority in favour of imprisonment and a substantial majority in favour of the legally enforced treatment of the incestually abusing parent. See Scott 'Legally enforced treatment of the incestually abusing parent - Problems of policy and practice' (1989) **Journal of Social Welfare Law** 217.

in their thousands to telephone organisations such as Childline, giving as their reasons for anonymity their fear of having to give evidence in court and their wish for their abuser not to be imprisoned.

41.14.14 So, are we saying that sexual offenders who commit crimes in the intra-familial context should not go to prison or, if they go, not spend too much time in prison? Surely not. In a number of cases, there is no alternative to prison. But in others there does exist the possibility of ordering treatment under a named registered therapist by means of a carefully constructed sentencing or probation order, with a condition of residence away from home. We point this out specifically because of the barrage of media coverage¹⁶¹ following a statement attributed to the Project Leader, Ms Joan van Niekerk, at a briefing to the Portfolio Committee on Welfare in Cape Town on the 16 November 1999. Ms Van Niekerk's suggestion of appropriate and creative sentencing in incest cases was seen as a call for leniency on incest crimes.¹⁶² This is certainly neither the case nor, our intention.

41.14.15 On the other hand, it must be pointed out that there is also support for the idea that incest cases need to be treated differently. **Mrs Elma Hunter**,¹⁶³ for instance, suggests that the perpetrator and his whole family in incest cases be dealt with at home instead of the perpetrator being charged in a public court and sentenced to imprisonment. She suggests that the whole family, perhaps even the extended family, be made aware of what has happened, and then be counselled to deal with all the issues that arise. She continues:

¹⁶¹See, for instance, 'Call for leniency on incest crimes' **The Star**, 17 November 1999, headline; 'Creativity, not leniency sought in incest cases' **The Star**, 18 November 1999, headline. See also the media statement issued by the Law Commission dated 19 November 1999 in this regard.

¹⁶²On the basis of the reporting in **The Star**, the **Women's Lobby** (fax letter dated 25 November 1999) condemned the position ascribed to Ms Van Niekerk in the strongest possible terms: 'Joan van Niekerk's explanations are an insult to the social workers and child-care organisations who, like TWL, are outraged by this suggestion (of leniency on incest crimes). ... Her assumption that "children are reluctant to expose someone they have an affectionate relationship with" is ludicrous ...'.

¹⁶³Letter dated 18 November 1999.

Families where incest has been exposed have often, in my experience, been so traumatized that they fall apart and indeed, the victim wishes that she had never spoken about the event.

41.14.16 The Commission, however, is of the opinion that Ms Hutton's comment is extremely dangerous as the treatment of the incest perpetrator in the home-setting often perpetuates a serious risk to the victim.

41.14.17 If the criminal law is to deal effectively with the problem of child sexual abuse and such abuse in the intra-familial context in particular, it needs both a stick and a carrot to persuade the guilty to admit what they have done. The stick should not take the form of increased prison sentences, but rational changes in the law of criminal evidence to increase the chances of convicting the guilty. We need to alter the present state of affairs so that there is a realistic likelihood of convicting a guilty person even where he or she does not confess, so that there is less point in denying the offence and pleading not guilty. The carrot should be less reliance on imprisonment or long term imprisonment, and far greater use of treatment, for those who are prepared to admit their guilt and accept responsibility for their behaviour. If a co-ordinated approach meant more admissions, it might mean less need for criminal proceedings in a number of cases where they would otherwise be necessary (e.g. as a diversion option). It should also mean that insofar as more child abuse cases do result in criminal proceedings, there is not an enhanced proportion of 'not guilty' pleas among them. As Lord Justice Butler Sloss said in the Cleveland Report:¹⁶⁴

There is a need to recognise the problems of an abuser who may wish to confess to the abuse but is inhibited from doing so by fear of the consequences. Some consideration might be given in certain circumstances to the wider interest of the child and the family and whether different arrangements might be made in suitable cases for those abusers who admit their guilt, who co-operate with the arrangements for the child and who are prepared to submit themselves to a programme of control.

41.15 **Evaluation and recommendations**

41.15.1 Despite the provisions of the **Criminal Law Amendment Act** 105 of 1997, sentencing in South Africa remains contingent on the exercise of judicial discretion. This

¹⁶⁴**Report of Inquiry into Child Abuse in Cleveland** 1987 CM 412.

discretion creates a tension between the formulation of widely applicable general sentencing rules and ensuring that each case is dealt with on its particular merits. Judicial officers have tended to emphasise the merits of each particular case rather than attempt to develop general rules. As sentences are designed to suit the circumstances of each particular case, it is inevitable that disparity will occur.

41.15.2 Research has shown that the provisions for mandatory minimum sentences introduced by the 1997 **Criminal Law Amendment Act**, which sought to ensure that some serious offences were punished more severely and also to bring a measure of uniformity to the sentencing process, have effected some changes. Sentences for some crimes, most notably rape, are now longer than they were before.¹⁶⁵

41.15.3 However, the 1997 Act has also caused further difficulties. Firstly, judicial officers, many of whom were opposed to the Act from its inception, have continued to criticise it for limiting their discretion. The Report in Project 82 of the South African Law Commission concludes that the 1997 Act created difficulties for sentencers in that the Act deals with a limited number of crimes while other serious crimes are not dealt with at all, thus disturbing the proportionality between various types of crime.¹⁶⁶ Further, there has been little consistency between the judges in applying the "substantial and compelling circumstances" test. Secondly, the potential impact that the 1997 Act would have on sentencing patterns and the resultant effect that it would have on the prison system was not planned for.

41.15.4 Criticisms emerge, however, when this disparity is considered unjustified. Unjustified disparity will occur where sentences are not uniform due to a lack of consensus across the judiciary on the relative seriousness of offences, mitigating factors, aggravating factors, relevant circumstances of the offender and relative weight to be given to each of these factors.¹⁶⁷ Generally it is accepted that uniformity of sentencing is impossible, but that should

¹⁶⁵South African Law Commission **Sentencing: (A New Sentencing Framework)** Report November 2000 at p 24.

¹⁶⁶Ibid.

¹⁶⁷Research on this topic indicates that apparently unjustified disparity of sentencing occurs in most jurisdictions. See generally, **Sentencing: Report of the Victorian Sentencing Committee** (April 1988) Vol 1 pp 149 - 157.

not preclude uniformity of approach.¹⁶⁸ As a result of the criticisms of the sentencing system over the past decade, including the 1997 Act which provides for minimum maximum sentences, the Commission proposed a new framework. Briefly,¹⁶⁹ the details are:

41.15.4.1 The key to the proposal is that the different arms of government enter into a new partnership. There will be more guidance for the courts on sentencing. In the first instance this will take the form of sentencing principles articulated in legislation. In this way there will be a decisive break with the common law, which has recognised divergent sentencing principles without establishing a clear relationship or hierarchy.

41.15.4.2 These principles will be supplemented by sentencing guidelines developed by an independent Sentencing Council for a particular category or sub-category of offence. The Sentencing Council will have to do research and consult widely before developing guidelines. The Council will also have to publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation, determine the value of fine units and make policy recommendations on the further development of community penalties.

41.15.4.3 The Commission proposes that judicial officers should play a prominent role in such a Council. The Commission recommends a simple system of direct guidelines which are to be sufficiently flexible to allow for the development of a jurisprudence on the grounds of departures from the guidelines.

41.15.4.4 The Sentencing Council will receive requests from the Ministers of Justice and Constitutional Development and Correctional Services to develop guidelines for a category of offences. In this way Cabinet and Parliament will be able to feed into the process public opinion.

4.15.4.5 Explicit attention is given to restitution and compensation for victims of crime and a new sentence of reparation is imposed.

¹⁶⁸See the comments made in this regard by Lord Lane in **R v Bibi** (1980) 71 Cr App R 360 at 361.

¹⁶⁹The details hereunder are reproduced from the comprehensive Report of the South African Law Commission **Sentencing: (A New Sentencing Framework)** Report November 2000 p 28 - 30.

41.15.4.6 Provision is made for victim impact statements to be presented to court. Victims must be told when and how they may be involved in the eventual release of sentenced prisoners from prison.

41.15.4.6 Due to the specific nature of sexual offences, the Project Committee is of the view that it is imperative for the Sentencing Council to ensure that skilled input on the management of sexual offenders informs the process of developing sentencing guidelines. Further, consideration needs to be given by the Sentencing Council of the possible need to develop sentencing guidelines for sexual offences that are modelled not only on punishment of the offender, but also treatment of the offender and should take into account long term community protection.

41.15.4.7 Internationally, there are several control mechanisms which are designed to reduce the disparity between sentences. These mechanisms may be classified as either 'internal', that is those imposed from within the judiciary, and 'external', those imposed from outside, for example by statute. Guideline judgments, sentencing information and judicial education are all examples of internal mechanisms. The **Criminal Law Amendment Act 105** of 1997 is an example of an external control mechanism.

41.15.4.8 **Given the fact that the Commission has a special investigation dealing with sentencing and in the light of the work done by the Project Committee on Sentencing, the Commission makes only the following limited recommendations in this discussion paper on the sentencing of sexual offenders:**

41.15.4.9 **Recommendations**

1. **The proposed Sentencing Council should make use of specific input by persons skilled in the management of sexual offenders.**
2. **The Sentencing Council should bear in mind that sexual offenders are not a homogeneous group and that there are different kinds of sexual offenders requiring a differential approach.**

3. **The Sentencing Council should, in relation to sexual offences, consider if there is a need to develop sentencing guidelines on a community protection model which entails long term supervision of dangerous offenders after normal parole and the need to engage sex offenders in treatment programmes.**

CHAPTER 42**OTHER SENTENCING AND TREATMENT OPTIONS FOR SEXUAL OFFENDERS****42.1 Introduction**

42.1.1 Some sentencing and treatment options specific to sexual offenders are discussed in this Chapter. Amongst these are the possibility of introducing sexual offender and drug treatment and testing orders, chemical castration, the imposition of notification and registration requirements on sexual offenders, and preventing unsuitable persons from working with children. Victim compensation and the compulsory treatment of sexual offenders are being dealt with in separate Chapters.¹

42.2 Sexual offender and drug treatment and testing orders**42.2.1 Introduction**

42.2.1 Drug and alcohol abuse are major contributing factors in the commission of crime and sexual crimes in particular. Curbing acts of sexual violence and treatment of sexual offenders can be strengthened by requiring the sexual offender to refrain from using drugs and or alcohol and to submit to regular testing to determine whether drugs are being misused.

42.3 Current Law

42.3.1 In assessing the current position, the Commission has chosen to have regard to the **Correctional Services Act** 111 of 1998, which was assented to on 19 November 1998, but the date of commencement is still to be proclaimed. We have elected to focus on the new legal position (even though it is not yet in operation) in order to ensure that if any amendments are necessary to take into account the specific nature of sexual offences, such amendments can be catered for. In terms of section 52 of the 1998 **Correctional Services Act** persons on parole may be subjected to community corrections (provided that the person who is to be

1 Chapters 40 and 41 respectively.

subjected to community corrections agrees to the stipulated conditions and undertakes to cooperate in meeting them).² A community correction may stipulate that the person concerned-

- (a) is placed under house arrest;
- (b) does community service;
- (c) seeks employment;
- (d) takes up and remains in employment;
- (e) pays compensation or damages to victims;
- (f) takes part in treatment, development and support programmes;
- (g) participates in mediation between victim or offender or in family group conferencing;
- (h) contributes financially towards the cost of the community corrections to which he or she has been subjected;
- (i) is restricted to one or more magisterial districts;
- (j) lives at a fixed address;
- (k) refrains from using or abusing alcohol or drugs;
- (l) refrains from committing a criminal offence;
- (m) refrains from visiting a particular place;
- (n) refrains from making contact with a particular person or persons;
- (o) refrains from threatening a particular person or persons by word or action;
- (p) is subject to monitoring;
- (q) in the case of a child, is subject to the additional conditions as contained in section 69;³

42.3.2 Section 67 of the **Correctional Services Act**⁴ further provides that where there is a reasonable suspicion that a person has used or abused alcohol or drugs in contravention of a community correction order,⁵ a correctional official may require such person to allow a designated medical officer to take a blood and urine sample in order to establish the presence of alcohol or drugs in the blood or urine.

42.3.3 Section 70 of the **Correctional Services Act**⁶ specifies that in the case of non-compliance with a community correction, depending on the seriousness of the non-compliance, the Commissioner of Correctional Services, may -

2 Section 51 (1) and (2).

3 Section 52(1)(a) - (q) of the **Correctional Services Act** 111 of 1998.

4 111 of 1998.

5 Section 52(1)(k).

6 111 of 1998.

- (a) reprimand the person;
- (b) instruct the person to appear before the court, Correctional Supervision and Parole Board or other body which imposed the community correction; or
- (c) issue a warrant of arrest of such person.

42.3.4 Section 73(3) of the 1998 Act prescribes that a sentenced prisoner must be released from prison and any form of community corrections imposed in lieu of part of a sentence of imprisonment on the expiration of the term of imprisonment that was originally imposed.

42.4 The example of the United Kingdom

42.4.1 We have seen that the **Crime and Disorder Act** 1998 in the United Kingdom provides for a plethora of orders which can be obtained in sexual and violent offence cases. We are essentially interested in the so-called 'sex offender order' and the 'drug treatment and testing order'. For the sake of convenience, we quote the two relevant sections in full:⁷

2. - (1) If it appears to a chief officer of police that the following conditions are fulfilled with respect to any person in his police area, namely -

- (a) that the person is a sex offender; and
- (b) that the person has acted, since the relevant date, in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him,

the chief officer may apply for an order under this section to be made in respect of the person.

(2) Such an application shall be made by complaint to the magistrates' court whose commission area includes any place where it is alleged that the defendant acted in such a way as is mentioned in subsection (1)(b) above.

(3) If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (a 'sex offender order') which prohibits the defendant from doing anything described in the order.

(4) The prohibitions that may be imposed by a sex offender order are those necessary for the purpose of protecting the public from serious harm from the defendant.

7 For the position in Scotland, see sections 20 and 89 of the **Crime and Disorder Act** 1998.

(5) A sex offender shall have effect for a period (not less than five years) specified in the order or until further order; and while such an order has effect, Part I of the Sexual Offenders Act 1997 shall have effect as if -

- (a) the defendant were subject to the notification requirements of that Part; and
- (b) in relation to the defendant, the relevant date (within the meaning of that Part) were the date of service of the order.

(6) Subject to subsection (7) below, the applicant or the defendant may apply by complaint to the court which made a sex offender order for it to be varied or discharged by a further order.

(7) Except with the consent of both parties, no sex offender order shall be discharged before the end of the period of five years beginning with the date of service of the order.

(8) If without reasonable excuse a person does anything which he is prohibited from doing by a sex offender order, he shall be liable -

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

(9) Where a person is convicted of an offence under subsection (8) above, it shall not be open to the court by or before which he is so convicted to make an order under subsection (1)(b) (conditional discharge) of section 1A of the 1973 Act in respect of the offence.

61. - (1) This section applies where a person aged 16 or over is convicted of an offence other than one for which the sentence -

- (a) is fixed by law; or
- (b) falls to be imposed under section 2(2), 3(2) or 4(2) of the 1997 (Sexual Offender) Act.

(2) Subject to the provisions of this section, the court by or before which the offender is convicted may make an order (a 'drug treatment and testing order') which -

- (a) has effect for a period specified in the order of not less than six months nor more than three years ('the treatment and testing period'); and
- (b) includes the requirements and provisions mentioned in section 62⁸ below.

(3) A court shall not make a drug treatment and testing order unless it has been notified by the Secretary of State that arrangements for implementing such orders are available in the area proposed to be specified in the order and the notice has not been withdrawn.

8 The section deals with the requirements and provisions to be included in drug treatment and testing orders.

(4) A drug treatment and testing order shall be a community order for the purposes of part I of the 1991 Act; and the provisions of that Part, which include provisions with respect to restrictions on imposing, and procedural requirements for, community sentences (sections 6 and 7), shall apply accordingly.

(5) The court shall not make a drug treatment and testing order in respect of the offender unless it is satisfied -

- (a) that he is dependant on or has a propensity to misuse drugs; and
- (b) that his dependency or propensity is such as requires and may be susceptible to treatment.

(6) For the purpose of ascertaining for the purposes of subsection (5) above whether the offender has any drug in his body, the court may by order require him to provide samples of such description as it may specify; but the court shall not make such an order unless the offender expresses his willingness to comply with its requirements.

(7) The Secretary of State may by order amend subsection (2) above by substituting a different period for the minimum or maximum period for the time being specified in that subsection.

42.4.2 The relevant parts of section 62 of the **Crime and Disorder Act 1998** reads as follows:

(1) A drug treatment and testing order shall include a requirement ('the treatment requirement') that the offender shall submit, during the whole of the treatment and testing period, to treatment by or under the direction of a specified person having the necessary qualifications or experience ('the treatment provider') with a view to the reduction or elimination of the offender's dependency on or propensity to misuse drugs.

....

(4) A drug treatment and testing order shall include a requirement ('the testing requirement') that, for the purpose of ascertaining whether he has any drug in his body during the treatment and testing period, the offender shall provide during that period, at such times or in such circumstances as may (subject to the provisions of the order) be determined by the treatment provider, samples of such description as may be so determined.

42.5 Evaluation

42.5.1 It is clear that the sex offender and drug and alcohol orders of the United Kingdom extend greater protection to the community and as such we need to consider whether we should introduce similar provisions. Before that question is answered, it is necessary to compare community corrections that may be imposed in terms of the **Correctional Services Act** with the United Kingdom provisions to determine whether they may be put to use to achieve the same goal.

42.5.2 There are a number of similarities. Both the South African Act and the United Kingdom provisions may, *inter alia*, limit movement, require participation in treatment, development and support programmes, may require that the offender refrains from using or abusing alcohol or drugs and from visiting particular places.

42.5.3 The differences are more illuminating. The United Kingdom legislation does not limit the nature of the sex offender or drug and alcohol order that may be issued by reference to a set list. However, the South African list of the type of community correction orders that may be issued is fairly extensive, but limited as there is no catch-all or discretionary clause.

42.5.4 The major distinction between the South African Act and the United Kingdom legislation is that in South Africa the authority to impose a community correction order ceases on expiration of the term of imprisonment. The United Kingdom legislation, on the other hand, is not limited in its application to persons on parole. In effect a sex offender order and a drug treatment and testing order is a form of long term supervision and community protection. This is an important aspect as it is not uncommon for sex offenders to re-offend many years later. The result of this difference translates into the South African Act and the United Kingdom legislation being very different in the purpose and the objectives that may be achieved through reliance on the different legislation provisions.

42.5.6 Another major distinction is the focus in the South African Act on correction of behaviour based on the original offence for which the offender was convicted. The United Kingdom legislation, on the other hand, focusses on the protection of the community and an order must be based on the offender's behaviour subsequent to his or her release which, of its nature, would imply some form of suspicious behaviour. The effect of this difference results in the United Kingdom legislation being more focussed on offenders who pose a real risk and consequently may have cost effective implications in the employment of resources.

42.5.7 In terms of the UK legislation, it is a criminal offence if an offender breaches a sex offender order it is a criminal offence. In terms of the South African 1998 **Correctional Services Act**, the breach of a community correction order is a breach of parole and the consequences are governed by section 70. Those consequences may be a reprimand or, if serious, result in the offender having to return to prison to complete his or her term of imprisonment.

42.5.8 From the differences above it is clear that the provisions in the South African legislation do not cater for either sex offender orders or drug treatment and testing orders. A sex offender order can be ordered by a court, after the period of parole, if it appears to a chief officer that a person previously convicted of a sex offence has acted, since the date of conviction, in such a way as to give reasonable cause to believe that an order is necessary to protect the public. Similarly a drug treatment and testing order can be ordered by the court (which convicted the offender), and is not limited to come into force during a period of parole or even immediately after conviction.

42.5.9 The Commission is of the opinion that the additional protection provided to the public by such orders would be an important step towards reducing sex crimes as it can prevent further offences before they are committed. A number of issues must be considered before formulating such a recommendation for our legal system.

42.5.9.1 The first relates to whether such orders would be constitutional. Although it is not possible to give a final answer, as we do not presume to usurp the role of the Constitutional Court, it is possible to follow the courts' approach (as gleaned from other cases) to assess whether such a provision could meet the test of constitutionality.

42.5.9.2 The initial question is whether a sex offender order and / or a drug treatment and testing order would limit the rights of the offender. Clearly the answer must be in the affirmative as an order may limit, *inter alia*, freedom of movement, association and economic rights. The question that follows is whether that limitation is justifiable and reasonable in an open and democratic society. This involves balancing the right of the general public to protection and physical integrity against the offender's rights.

42.5.9.3 The Commission is of the opinion, bearing in mind the high incidence of sex offences frequently committed against the most vulnerable members of society, that such a limitation is justifiable and reasonable provided that, in relation to sex offender orders, the opinion that the offender poses a "serious risk" may be objectively assessed by the court; and the offender is given notice of the application and heard by the court, should he or she wish to defend the application. Similarly, an offender must be given notice by the court of the possibility that the court may impose a drug treatment and testing order and be given the opportunity to be heard on the matter.

42.5.9.4 In relation to drug treatment and testing orders, the Commission recommends that this be extended to include the use of alcohol due to the high incidence of alcohol abuse in persons guilty of offences involving child abuse.⁹

42.5.9.5 The next issue to be considered is who should be able to bring an application for a sex offender order? The United Kingdom legislation specifies that it should be a “chief officer”. Within the South African context, should the potential applicant be so limited, or should any person who has reason to believe that an offender is engaging in conduct that may result in serious harm, be entitled to bring such an application?

42.5.9.6 In view of the drastic shortage of police officers, it may be difficult to restrict applicant status to them. In the circumstances, should applicant status be confined to certain specified local authority officers, alternatively other specified officials? One of the potential difficulties of allowing “any person” to bring such an application is that it would require setting up a system whereby persons wishing to bring such an application would have to check official information to ascertain whether the person they wish to bring the application against, is in fact a convicted offender.

42.5.9.7 The Commission proposes that it should only be open to the general public to bring an application for a sex offender order, if they have requested designated persons to bring the application, the designated person has failed to do so (within 48 hours) and has not given good reason for the failure to bring the application or decision not to apply for a sex offender order. The Commission makes no firm recommendation in this regard and calls for comment on the interim proposal that any of the following persons be able to bring an application for a sex offender order:

- (a) a police officer;
- (b) a police reservist;
- (c) employee or member of a non-governmental or community based organisation;
- (d) member or employee of a private security firm;
- (e) a social worker;
- (f) medical personnel;
- (g) local authority officials to be designated by each Local Authority.

9 According to Dr J Lofell approximately 90% of cases of reported child abuse involve alcohol abuse by the offender.

42.5.9.8 The Commission recognises that there may be resistance by sex offenders to compulsory attendance at a treatment programme and as a result such programmes may be less effective. Nevertheless, the Commission is of the opinion that it is crucial that a sex offender order should include a direction that the offender in question attend a treatment programme. It must be borne in mind that a skilled facilitator can turn negative motivation around and the potential benefits to the community when treatment programmes are attended are great.

42.5.9.9 In addition, a sex offender order must include provisions that specify what an offender, who is subject to a sex offender order may not do. Failing such specific terms the effectiveness of such orders will be greatly diminished. Such orders could include provisions that the offender:

- not loiter around schools, swimming baths and the like; and
- may not see specific persons.

42.5.10 **Recommendation**

1. Sex offender orders

(1) A court may, upon application by a person referred to in subsection (2), grant an order prohibiting a person convicted of a sexual offence, notwithstanding the fact that the convicted person has lodged an appeal or instituted review proceedings regarding his or her conviction or sentence, from -

- (a) acting in a way that is intended to cause serious harm to any particular person or members of the public;**
- (b) frequenting any specified location;**
- (c) establishing or attempting to establish contact with any specified person.**

(2) An application referred to in subsection (1) shall be made on affidavit to the magistrate's court in whose area of jurisdiction it is alleged that the convicted person is or was acting in a way referred to in that subsection, and may be brought by -

- (a) a police official;**

- (b) a police reservist;
- (c) a director or authorised employee or member of a non-governmental or community based organisation;
- (d) any member or employee of a private security institution;
- (e) a social worker;
- (f) a medical officer; or
- (g) an official designated by a local authority.

(3) Any person may request a person referred to in subsection (2) to bring an application as contemplated in this section and may, upon failure of such person to bring an application within 48 hours of the request without good reason, make such application to the court referred to in subsection (2).

(4) The court hearing the application for an order as contemplated in this section may only grant such order if it is satisfied that the person in respect of whom the order is sought has been convicted of a sexual offence and that the order is necessary for the purpose of protecting any particular person or members of the public from serious harm by the convicted person and may, if so satisfied, direct that the convicted person is prohibited from acting in any way which the court deems fit.

(5) An order contemplated in this section shall have effect for a period of at least five years from the date of the order or for such longer term as may be prescribed in the order, and may only be revoked by the court within a shorter period of time upon application by the person who first obtained the order or by the convicted person with the consent of the person who first obtained the order.

(6) A convicted person in respect of whom an order has been issued by a court as contemplated in this section, and who contravenes any prohibition or direction stipulated in such order, is guilty of an offence and shall be liable, upon conviction, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

2. Drug and alcohol treatment and testing orders

xx. (1) A court may, upon conviction of a person of having committed a sexual offence and if satisfied that the convicted person is dependent on or has the propensity to misuse alcohol or any drug and may benefit from treatment, grant an order, subject to the provisions of subsection (2), requiring such person to -

- (a) submit, for a specified period of time, to treatment by or under the direction of a specified person or institution with the required qualifications for purposes of reducing or terminating the convicted person's dependency on or propensity to misuse alcohol or drugs; and
- (b) provide samples, at any time during the period of treatment referred to in paragraph (a), as may be determined by the person or institution providing treatment for purposes of testing whether the convicted person is continuing to use alcohol or drugs.

(2) A court may not issue an order referred to in subsection (1) unless it has been notified by the Director-General of the Department of Social Development that facilities for the implementation of such an order are available in the area where the convicted person is intended to submit to treatment.

42.6 Chemical castration

42.6.1 Introduction

42.6.1.1 While the Commission understands that it is natural for victims of sexual offences and their families and friends to react by calling for extreme responses, we believe the real test for the judicial system lies in increasing the conviction rate and creating certainty and consistency about apprehension and punishment. Manifestations of this call for extreme measures range from demands to reinstate the death penalty, the administering of chemical castration and forced amputation.

42.6.2 Submissions to the Issue Paper

42.6.2.1 The possibility of a court imposing chemical castration as a sentencing option strangely did not elicit a stream of comments. The opinion of those who did comment, seems to be divided. The **Tshwaranang Legal Advocacy Centre** does not support the call for

castration of **child** sexual offenders. Because of the specific child focus of the Issue Paper, it is not possible to say whether this objection will hold true for adult sexual offenders. **Ms W L Clark**, a senior public prosecutor from Verulam, says that chemical castration might be appropriate in some cases. She points out, however, that rape is often a violent crime as opposed to a sexual one and chemical castration may therefore not be the answer. She further says monitoring offenders re-released into society would certainly pose practical problems.

42.6.2.2 However, the debate was taken to new heights after Ms S C Vos posed a question to Deputy President Jacob Zuma in Parliament on the position of the Government on chemical castration as a sentencing option.¹⁰ The statement that Government is considering chemical castration as a possible punishment for repeat sexual offenders made newspaper headlines.¹¹

42.6.3 Comparative analysis

42.6.3.1 The United States of America is the only country¹² in the world which has legislation permitting chemical castration of repeat sexual offenders. The state of **California** adopted the nation's first law requiring repeat child molesters to undergo chemical castration. AB 3339 became law on 18 September 1996, amending section 642 of the California Penal Code. The amended statute provides that any person guilty of a first conviction of specified sex offences, where the victim is under 13 years of age, may be required to receive medroxy progesterone acetate treatment upon parole, and any person convicted of two such offences **must** receive the treatment during parole. This medication is administered by injection and has the effect of lowering the testosterone level, blunting the sex drive. The parolee begins the treatment prior to his release on parole and the treatment continues until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary.

10 Deputy President Jacob Zuma released a press statement on the 28 October 1999 to the effect that it was incorrect to suggest that the Government is considering castration of repeat sexual offenders when no such proposal has yet been tabled by the Law Commission. <http://www.polity.org.za/govdocs/pr/1999/pr1028a.html>

11 See, for instance, 'Plan for "chemical castration"' **The Star**, 28 October 1999, p. 1; Rich Mkhondo 'Surgical castration the best option' **Pretoria News**, 1 November 1999, p. 12

12 It is also one of the few countries in the world where the death penalty is still imposed in a number of States.

42.6.3.2 Some other States such as Kansas, Florida, Georgia and Montana have followed the lead of California. **Montana**'s law requires chemical treatments for even first-time offenders convicted of sex crimes including, but not limited to those with child victims. The treatments are to be administered by the Department of Corrections, begin one week before release from confinement, and continue until the Department determines that such treatment is no longer necessary. Failure to comply with the required chemical treatment can result in incarceration without parole for ten to 100 years. **Iowa** also adopted legislation on 15 April 1998 to authorise the state to offer or require hormonal treatment or 'chemical castration' as a condition of release for convicted sex offenders. Under this measure, a person convicted of sexually abusing a child aged 12 years or younger could agree to undergo hormonal treatment as a condition of release from confinement. Treatment for repeat offenders is not mandatory unless it is determined by a court that such treatment would be effective.

42.6.3.3 The **Florida** law gives the court discretion to sentence defendants to chemical treatment if the defendant is convicted of sexual battery, and an offender can opt for castration as an alternative penalty under specific circumstances. The law provides that chemical treatment is mandatory if a defendant has a subsequent conviction of sexual battery. In **Georgia** the law requires, at sentencing, that persons convicted of a first offence of aggravated child molestation undergo psychiatric evaluation to determine suitability of medroxy progesterone acetate chemical treatment. Probationers can be required to receive such treatments, as can other sexual offenders released from custody. Treatment may continue until demonstration to the court that it is no longer necessary.

42.6.4 **Evaluation**

42.6.4.1 The desire to want to punish severely sexual offenders who commit sexual offences repeatedly is wholly understandable and legitimate. To give effect to this clear need, Government has adopted the **Criminal Law Amendment Act** 105 of 1997. This **Minimum Sentences Act**, as the Act is commonly known, provides for compulsory minimum sentences to be imposed where a person is convicted of certain serious offences. Section 51 of the Act provides, for instance, for a compulsory sentence of life imprisonment when a person convicted of a second rape offence or when rape is committed involving the infliction of grievous bodily harm. Should judicial officers apply the clear provisions of this Act properly, then chemical castration would not be an issue as a second offender will spend the rest of his life behind bars.

42.6.4.2 It is also important to point out that rape is not about sex. It is about violence and power. Should the drug used in chemical castration have the required effect, then the sexual offender will simply resort to other means to degrade and humiliate women and children. Such an offender could then resort to inserting bottles or sticks or knives into the sexual organs of his or her victim. Chemical castration alone will not stop sexual offenders who prey upon victims because of their desire for domination and power.

42.6.4.3 The scientific community is divided about whether chemical castration really solves the problem of recidivism among sex criminals. While Depo-Provera (the drug administered to accomplish chemical castration) has been shown to have some salutary effect in curbing a molester's sexual drives, even proponents admit that unless those being treated are co-operative and receiving counselling, the drug won't do much good. Indeed, according to Dr Fred F Berlin, director of the National Institute for the Study, Prevention and Treatment of Sexual Trauma, a recognised expert in the field, it is "like a diet medication. You have to want to stop eating, too". Further, in order for the drug to work, an injection has to be administered every seven to ten days.

42.6.4.4 Chemical castration on its own therefore does not work. Unless one goes the surgical castration route, which is surely a barbaric practise reminiscent of Nazi Germany, chemical castrated offenders must be closely monitored. For the treatment to be effective, an offender needs to be injected regularly. In addition, the person needs intensive counselling to bring about the desired behavioural change. Does a criminal who is supposed to serve a compulsory life sentence deserve this kind of treatment? Should the resources not be directed to providing counselling and treatment for the victims of sexual offences?

42.6.4.5 It must also be realised that chemical castration can only work as part of a sentence. Once a person has served his or her sentence, he or she has paid their dues to society and it will constitute double jeopardy if such a person is required to continue the treatment after serving that sentence.

42.6.4.6 It is also necessary to consider the human rights implications of chemical castration. Section 12(1)(e) of the Constitution of the Republic of South Africa Act 108 of 1996 secures for every person the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way. This includes the sexual offender.

42.6.4.7 In **Kindler v Canada (Minister of Justice)**¹³ the Canadian Supreme Court held *obiter* that some forms of punishments will always constitute cruel, inhumane or degrading punishment. As examples of such form of punishment, the court mentions the lobotomisation¹⁴ of certain dangerous offenders or the castration of sexual offenders. In the light of our Constitutional Court judgment on the death penalty,¹⁵ it is likely that castration, at least of the surgical kind, and lobotomisation will be regarded as constituting cruel, inhumane or degrading punishment.

42.6.4.8 American case law is also pertinent here. In **Mickle v Henrichs**¹⁶ a man was sentenced to prison and a vasectomy was performed in order to prevent future procreation. The Nevada court enjoined the enforcement of the vasectomy order stating that it was prohibited by the ban on cruel and unusual punishment. The court asserted that the offender should not suffer the mutilation and brand of infamy that accompanies the operation once he has served his sentence and is introduced back into society. In **State v Brown**¹⁷ the Supreme Court of South Carolina found that surgical castration violated the prohibition of cruel and unusual punishment. By regarding castration as a form of mutilation, the court aligned itself with earlier decisions prohibiting punishment that degrades the offender. In **Skinner v Oklahoma**¹⁸ the US Supreme Court found the punishment of sterilization unconstitutional on equal protection grounds. As demonstrated by these decisions, there is strong support for the proposition that surgical castration and sterilization are inherently cruel.

42.6.4.9 Although perhaps the most frequently cited objection to chemical castration is that it violates the protection against cruel, inhuman or degrading punishment or treatment, it is certainly not the only one. Other fundamental rights and freedoms that can possibly be affected are the rights to human dignity, to bodily and physical integrity, to privacy, etc. Any person is entitled to these rights and freedoms in a free and democratic society.

42.6.4.10 Arguments advanced in support of mandatory chemical castration are:

13 (1992) 6 CRR (2d) 193 (SC).

14 Lobotomisation involves the surgical interruption of one or more nerve tracts in the frontal lobe of the brain.

15 **S v Makwanyane and another** 1995 (3) SA 391 (CC).

16 262 F 687 (D. Nev. 1918).

17 326 S. E. 2d 410 (S.C. 1985).

18 316 US 535 (1942).

- It prevents the future victimisation of children.
- There is a high incidence in recidivism with sexual offenders.
- Chemical castration is cheaper¹⁹ than keeping offenders in jail.
- Chemical castration relieves the offenders of their criminal sexual fantasies and is therefore beneficial to the offender.

42.6.4.11 The arguments in favour of chemical castration are not convincing.²⁰ It is doubtful whether chemical castration will prevent the future victimisation of children as sexual perpetrators will simply use other (and often more violent) means to obtain sexual gratification.

42.6.4.12 This argument (and the argument about the apparent link with sexual fantasies) is premised on the assumption that rape and other acts of sexual violence are about sex, which it is not.²¹

42.6.4.13 Chemical castration seems to be a doubtful first world solution to a problem not encountered at the same high level as in South Africa. Given our rape statistics and lack of control and supervisory mechanisms, it will also not be an affordable or workable solution. On a human rights level, proponents of chemical castration as a sentencing or treatment option could and should perhaps argue for the reintroduction of the death penalty (given the rate of recidivism and costs). However, it is surely not appropriate in a democracy based on human rights.

42.6.5 Recommendation

42.6.5.1 **The Commission does not support chemical castration as a sentencing option.**

19 According to Peter J Gimino III 'Mandatory chemical castration for perpetrators of sex offences against children: Following California's lead' 1997 (25) **Pepperdine LR** 67 at 101 the cost of chemical castration is estimated at 'only' US \$ 2400 per year per parolee. According to the California Department of Corrections, it would have cost an estimated US \$ 1, 6 million to chemically castrate the 687 sex offenders paroled between 1993 and 1995 in California.

20 See also Edward A Fitzgerald 'Chemical castration: MPA treatment of the sexual offender' 1990 (18) **American Journal of Criminal Law** 1; Daniel L Icenogle 'Sentencing male sex offenders to the use of biological treatments - A constitutional analysis' 1994 (15) **Journal of Legal Medicine** 279; Kari A Vanderzyl 'Castration as an alternative to incarceration: An impotent approach to the punishment of sex offenders' 1994 (15) **Illinois University LR** 107.

21 Our premise is that rape and other acts of sexual violence are not about sex, but about power and control.

42.7 Notification and registers of sexual offenders and victims

42.7.1 Introduction

42.7.1.1 Community notification refers to the distribution of information regarding released sex offenders to law enforcement agencies, citizens, prospective employers, and community organisations. Megan's Law is the prime example of a legislative provision that enables law enforcement agencies to notify communities or specific vulnerable groups that a released or paroled sex offender is living in their area.

42.7.1.2 Criminal records convey information relating to the criminal law, but one of the main concerns in this area is information which may not have resulted in a criminal prosecution or conviction but is nevertheless crucial in demonstrating that an individual is unsuitable to work with children or a potential danger to society. However, there are major civil liberties implications in the use of this material if it is not properly processed and the subject of the information has not had the right to challenge it.

42.7.1.3 It is also important at the outset to stress that notification by and registration of sexual offenders should be seen as only one part of a network of measures and good practice to protect children and the community from those who might harm them. Any system of registration and notification can only identify people who have been found guilty of a criminal offence or have been through some sort of legal process - it cannot predict criminal behaviour. It is therefore important to point out that notification and registration requirements should not generate a false sense of security. There is no substitute for other essential recruitment and good practice procedures in selecting people to work with children such as taking up references.

42.7.2 Submissions received on the Issue Paper

42.7.2.1 In the Issue Paper numerous questions were posed on the purport, feasibility and mechanics of a register of sexual offenders.²² As a result, numerous submissions followed. A more general question was asked in the Issue Paper on chemical castration, prohibitions on

22 See para. 5.3.5 and 5.3.6.

convicted sexual offenders loitering near schools and other public places, and the feasibility of community notification programmes.²³ This question evoked less response.

42.7.2.2 The organisation **Women against Child Abuse**²⁴ is one of the respondents who argued strongly for the introduction of legislation to inform communities of the presence of convicted sexual offenders in their mist:

We want the same law enforced in this country (to be called possibly, Samatha's Law), that all convicted sex offenders have to report to the police when they move into an area, and the neighbours in a 5 - 7 km radius need to be told that he is living there and the crime he has committed. He also needs to report to the nearest police station, wherever he is, every month for the rest of his life.

42.7.2.3 The **Tshwaranang Legal Advocacy Centre** seems to support the call for measures where communities are informed of the impending release of sexual offenders from prison. However, there is no doubt it is very much in favour of a register of sexual offenders. The respondent states:

(T)he purpose of keeping such a register is to create a status demotion for sexual offenders. The social sanctions against this type of behaviour need to be increased. This (the register) should operate like the Consumer Bureau, where a person may be blacklisted for credit. In addition, once sexual offenders have served their sentences, the community into which they are being released should be warned. Such an offender's name would go on the list after conviction. It could be removed after a successful appeal. This information would be available to the public on request, as everyone has the right to information in terms of the Constitution.

As far as alleged offenders are concerned, the Constitutional Court would probably find that such a register violates the rights of the alleged offender. Nonetheless, the 'unofficial' record of alleged offenders should be kept, and the list should be destroyed every ten years. The reason it is important to keep this list is that many real offenders, by virtue of a failed prosecution, become 'alleged offenders'. Keeping an unofficial list would alert authorities when the same individual's name is reported by different and unconnected sources that may be dealing with a real offender. The list should be destroyed after ten years, so that if a person has not been reported again in ten years (or some reasonable period within which they are likely to have reoffended), then their slate can be wiped clean. This person's name would go onto the list after investigation, but before trial. The Ombudsperson for Children would be responsible for this register. The information on this list would not be available to the public, only to the police and other members of the team working with children.

23 See par. 5.12.5.

24 Submission prepared by Ms Nicole Barlow.

42.7.2.4 **Mr Kurt Worrall-Clare** is in favour of a national and / or provincial register of 'predatory sex offenders'. He proposes that sexual offenders be categorised in terms of the risk they pose to the community into which they have been released. Information on the register(s) should be made accessible to the police, the Department of Justice and Constitutional Development and other authorities such as schools and child care institutions. **Mr Worrall-Clare** says it should be mandatory that information on high risk and or repeat offenders be made available to the community into which such offenders are released.

42.7.2.5 The **Association for Persons with Physical Disabilities, Northern Cape**²⁵ favours the keeping of a register as 'it will help to see how many times an offender committed the same crime. It also helps to see whether the number of offenders are increasing and in what community or town'. The **Association** says names of offenders should be placed on the register at the beginning of the investigation.

42.7.2.6 **Women against Child Abuse** would like to see a national database set up of all known sex offenders,²⁶ and where they reside, and for it to be linked to Interpol, as a movement monitoring mechanism of sex offenders and paedophiles. **Ms Collet Wagner** of the Gauteng Department of Welfare and Population Development is also in favour of a register of convicted sexual offenders. Interestingly, she also argues for a register of survivors of sexual abuse.

42.7.2.7 The **Western Cape Street Child Forum**, however, sees the only useful purpose of a victim register to enable social workers and other professionals to gather information for treatment purposes. The **Forum** says, without specifying, that there are already procedures to obtain information which apply not only to sex abuse victims but to the history of any client. This information may be useful to understand the client, but if the client does not voluntarily disclose it is not of such weight that would justify an invasion of the victim's right to privacy. In conclusion, the **Forum** sees no need so important as to warrant there being a register for victims.

25 Submission prepared by **Ms Boniswa Kanguwe**.

26 This is also the opinion of **Ms Linda de Rooster** of the Psychology Department, Forest School for Cerebral Palsied Children.

42.7.2.8 **Dr J A van S d'Oliveira SC**, the then Attorney-General : Transvaal supports the introduction of a register of **alleged**²⁷ and **convicted** sexual offenders. He says:

Such a register is essential if proper protection and prevention is to be effected. Much can be gained from a comparative study of the international position. It is presumed that such a register can be dealt with in much a similar way as the present keeping of criminal records by the SAPS except that a separate register of alleged offenders should also be kept and the public should have a right of access to a register of convicted sexual offenders (double jeopardy deals with a duplicity of convictions and is not a relevant consideration). ... The alleged offender register should be for access only by the SAPS (and Welfare?) and should be of limited duration in respect of such offender.

42.7.2.9 The **Johannesburg Child Welfare Society**²⁸ points out that the question of registration of **alleged** sexual offenders is an extremely difficult one:

Clearly a register only of convicted offenders has very limited value given that such a small proportion of offenders is convicted. Meanwhile we face the scenario of the paedophile who moves from one children's service to the next, perhaps over many years, leaving a trail of circumstantial evidence and unproven allegations behind him, but without there being witnesses who are prepared to testify against him, or sufficiently watertight a case to prosecute him. Here again we have to balance the child's right to protection against the rights of the adult in question.

42.7.2.10 The **Johannesburg Child Welfare Society** then proposes a possible solution:

Possibly a system incorporating the following components and principles could be designed: where abuse is reported, particulars of the alleged or suspected offender are taken. The reporter is asked to give a detailed account of the reasons why the person is suspected, and of any of the evidence to back up the suspicion. This account is evaluated by a person with experience in the field who has the task of weeding out allegations for which insufficient grounds have been provided, using clear guidelines designed for this purpose. Access to the register is strictly controlled and is limited to specifically accredited individuals in recognised children's service organisations, for purposes only of the screening of staff and caregivers working directly with children in situations which could place them at risk. The information in question can be used only for that purpose, and may not be passed on to any person for any other person. Severe penalties are to be put in place for the submission of false or malicious statements, or the misuse of information on the register

27 The **National Council for Persons with Physical Disabilities in South Africa** also support the introduction of a register of alleged sexual offenders to be kept by the Department of Justice.

28 Submission prepared by **Dr J M Loffell**.

42.7.2.11 **Ms W L Clark**, Senior Public Prosecutor, Verulam supports the introduction of a register of **convicted**²⁹ sexual offenders. She sees the obvious purpose of keeping such a register to deter people from committing this kind of offence. In addition, she believes it could also be used very effectively in screening people who are applying for jobs which are going to bring them into regular contact with children. **Ms Clark** states that the most logical place to keep the register is at the SAPS Criminal Records Centre as it can then be linked to fingerprint records. **Mr P Nel**, a prosecutor in Port Elizabeth, points out, however, that the present system using fingerprints has 'proved (at least until now) to be too time consuming and inconvenient, and not accessible to private persons or institutions'.

42.7.2.12 **Advocate Rita Blumrick**, of the then Attorney-General's office, Pietermaritzburg, also regards a national register of convicted child abusers as vital for the better protection of children. She points out that child abusers have a propensity to seek employment or volunteer activities that will bring them into contact with children.

42.7.2.13 The **Western Cape Street Child Forum**³⁰ sees the purpose of a register of sexual offenders as something that would enable prosecutors and bail risk assessors to check whether previous allegations have been made and to prevent employers dealing with children from appointing such persons until cleared. The **Forum** suggests that a person's name should be placed on the register once an initial enquiry has established sufficient evidence to proceed with the investigation.

42.7.2.14 In its submission, the **South African National Council for Child and Family Welfare** list the following purposes of keeping a register of sexual offenders (as indicated by its members):

- to screen prospective employees wishing to work with children
- to monitor recidivism by and the effectiveness of therapy of offenders

29 **Ms Clark** says that to have a register for alleged sexual offenders would be tantamount to presuming the accused to be guilty and judging him or her without a fair trial: 'Clearly this is in conflict with the offender's constitutional rights, and should be guarded against as some people are wrongly "framed" and others are arrested and charged as a result of mistaken identity'.

30 Submission prepared by P Jackson.

- to monitor suspected or alleged³¹ perpetrators
- to monitor and control the incidence of child abuse
- to assist with sentencing of offenders
- to follow the patterns of abuse and for offence identification
- to have a list of abused children, information on the abuse, and to track the management of that case
- for statistical and research purposes
- to create public awareness and to act as a deterrent
- to prevent child sexual abuse and to protect children against exploitation by known offenders
- to screen potential foster or adoptive parents

42.7.2.15 In its submission, the **S A National Council** also identifies the following stages at which an offender's name should be placed on such a register. These are:

- after conviction (21 responses)
- immediately, on reporting of the offence and then with a record of the outcome (6 responses)
- at the time of referral for prosecution (2 responses)

42.7.2.16 The **S A National Council** identifies the persons and bodies who should have access to the information kept on such a register. Amongst the institutions identified are the courts (3 responses); the Department of Community Development (6 responses); the Department of Justice (9 responses); investigating officers, the police and the CPU (8 responses); social workers (14 responses), attorneys (2 responses); psychologists (3 responses); etc. Although the responses are not quantified, the **S A National Council** also list schools, the community, the media or anyone with a vested interest as entitled to access information on the register.

42.7.2.17 The submission of the **S A National Council** shows that the vast majority of respondents (37 for, 3 against, 2 no response) that such a register should include the names

31 Interesting enough, the majority of the responses (22 for, 17 against, 3 no response) to the questionnaire prepared by the **S A National Council** acknowledge that the right of the alleged perpetrator to be presumed innocent until proven guilty will be infringed if a register of **alleged** sexual offenders are to be established.

of juvenile and child sex offenders. **Ms W L Clark**, Senior Public Prosecutor at Verulam, supports the inclusion of the names of juvenile offenders in such a register because a significant percentage of sexual abuses are perpetrated by youths against other children. This view stands in contrast to the position taken by the **Department of Justice and Tshwaranang Legal Advocacy Centre** who argue that the names of juveniles and child sex offenders should not be included on such a register. **Tshwaranang** further says there should be very strict protection of the victim's name.

42.7.2.18 **Adv R Songca** of the Department of Private Law, University of the North says it is important to keep registers to record names of people who have been convicted (of sexual offences) and agreed to undergo therapy. He argues that this will help to determine how effective therapy is. The **Office of the SAPS Area Commissioner, Gauteng**³² maintains that it will be reasonable and justifiable in an open and democratic society (and therefore constitutional) to pass legislation that will permit the names and personal details of child abuse offenders to be published and circulated and to be kept on record. The **Office of the SAPS Provincial Commissioner, Western Cape**³³ likewise argues for the implementation of a register for sexual offenders. They contend that the listing of the name of the sexual offender on the register should form part of the sentence of the offender.

42.7.2.19 On the other hand, the **SAPS Child Protection Units in KwaZulu Natal** states that a register of sexual offenders will infringe the constitutional rights of offenders if it is dealt with irresponsibly. They say the possibility exist that people can misuse the information on such a register by 'branding' a person as a sexual offender which can also affect such person's family. They further say that if the general purpose of such a register is to 'check up on offenders', then there is no need as there is a general register for offenders available at the SAPS Criminal Record Centre to which access is available. **The Area Commissioner, Legal Services, East Rand**³⁴ also do not support proposals imposing a duty to inform the community into which a sexual offender is to be released of that offender's impending release or to prohibit sexual offenders access to public places, because of the practical difficulties of enforcing such provisions.

32 The submission was prepared by **Deputy Director A Loubser**.

33 Submission prepared by **Supt N Nilsson** and **Insp G Riedeman**.

34 Submission compiled by **Mr T S Tshabalala**.

42.7.2.20 The **Ms Thuli Madonsela**³⁵ supports the introduction of a register. Ideally, the Department says, such register should be for convicted sexual offenders. She concedes, however, that there may be a point in keeping a list of persons who have been repeatedly been linked to sexual offences even if such offenders escape conviction.

42.7.3 **Comparative legal analysis**

42.7.3.1 **The United Kingdom**

42.7.3.2 In the United Kingdom the **Sex Offenders Act** 1997 subject sexual offenders to notification requirements.³⁶ The period in terms of which a person remains subject to the notification requirements depends upon factors such as the length of the sentence of imprisonment imposed. For instance, a sexual offender who is or has been sentenced to imprisonment for life or for a term of 30 months or more shall remain subject to the notification requirements for an indefinite period.³⁷

42.7.3.3 A person who is subject to the notification requirements of the Act must notify the police the of following information within 14 days:³⁸

- his or her name and aliases, and particulars of name changes;
- his or her home address, and changes of home address;
- his or her date of birth.

42.7.3.4 A sexual offender may give an oral or written notification at any police station in his or her local area.³⁹ Failure to comply, without reasonable excuse, with the notification requirements or giving false information to the police, is criminally liable.⁴⁰ The Act also applies to young sexual offenders.⁴¹

35 Submission prepared by **Ms Thuli Madonsela** (Department of Justice).

36 Section 1 of the **Sex Offenders Act** 1997.

37 Section 1(4) of the **Sex Offenders Act** 1997.

38 Section 2(1) - (3) of the **Sex Offenders Act** 1997.

39 Section 2(5) of the **Sex Offender Act** 1997.

40 Section 3(1) of the **Sex Offender Act** 1997.

41 Section 4 of the **Sex Offender Act** 1997.

42.7.3.5 Moves are also underway to extend the notification requirements to persons convicted of abusing a position of trust. The **Sexual Offences (Amendment) Bill 2000** introduces a new offence where a person aged 18 years or older has sexual intercourse or engages in any other sexual activity with or directed towards a person under that age, if the person aged 18 years or over is in a position of trust in relation to the younger person in certain circumstances specified in the Bill.⁴² A person convicted of such an offence, unless they are under 20 years of age, will be subject to the notification requirements under the **Sexual Offenders Act 1997**.⁴³ Any person convicted of the offence may also be made the subject of an 'extended sentence' by the court.

42.7.3.6 **The United States of America**

- **Megan's law**

42.7.3.7 Perhaps the best known of all notification laws is the so-called Megan's Law.⁴⁴ This law is a federal law of the United States of America which requires states to make available information on sexually violent criminals who are released from prison or placed on parole. The law was named after 7-year-old Megan Kanka of New Jersey, who was raped and murdered in 1995. A twice-convicted child molester who lived on her block was charged with the crime.

42.7.3.8 Megan's Law provides for the police to notify neighbourhoods of the existence of serious and high risk sex offenders, and further provides for public access to sex offender information under controlled circumstances. The law provides three distinct means for the public to become informed of the identity of registered sexual offenders:

1. **Community Notification:** Under circumstances determined by the law enforcement agency, public or neighbourhood notifications may be made about the existence of certain registered sex offenders living in their neighbourhoods.

42 The four conditions are spelled out in clause 4 of the **Sexual Offences (Amendment) Bill 2000**.

43 Clause 5 of the **Sexual Offences (Amendment) Bill 2000**.

44 H.R. 2137, 104th Congress, 2nd session (1996).

2. **Sex Offender Identification Line:** Persons 18 years and older may call a number and check the names of up to two individuals per call. There is a charge of \$10 for the call. In order to check if someone is a registered sex offender, particulars such as names, and either their exact address, or their exact date of birth, or their California Driver's License number, or their California ID number, or their Social Security Number are needed.

3. **Megan's Law CD-ROM:** Yet another means to check the identity of registered sexual offenders is a regularly updated CD-ROM that has offender names, aliases, photographs, scars, marks, tattoos and county of residence. In order to view the CD-ROM you must (1) be 18 years of age or older, provide a California Driver's License for identification, sign a statement that you are not a registered sex offender, and that you understand that access to this information is for the public protection and not to harass, intimidate, or commit any crimes against any registrants, and if required, state a distinct purpose for looking at the CD-ROM. The CD-ROM runs on a specially designated computer at the law enforcement facility.⁴⁵

42.7.3.9 Megan's Law amended subsection (d) of section 170101 of the **Violent Crime Control and Law Enforcement Act** of 1994,⁴⁶ which contains the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the 'Jacob Wetterling Act'). Megan's Law is a federal law which provides guidance to the states to develop their state laws. A review of US state laws is given below.

42.7.3.10 Megan's Law makes two changes to the Jacob Wetterling Act: (1) it eliminates a general requirement that information collected under state registration programmes be treated as private data, and (2) it substitutes mandatory language for previously permissive language concerning the release of relevant information that is necessary to protect the public concerning registered offenders.

42.7.3.11 For the sake of completeness Megan's Law is quoted in full:

Section 1. **SHORT TITLE**

This Act may be cited as "Megan's Law".

Section 2. **RELEASE OF INFORMATION AND CLARIFICATION OF PUBLIC NATURE OF INFORMATION**

45 The current CD-ROM has approximately 64,000 entries.

46 Codified at 42 U.S.C. § 14071.

Section 170101(d) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(d)) is amended to read as follows:

“(d) **RELEASE OF INFORMATION-**

- (1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.
- (2) The designated State law enforcement agency and any local law enforcement agency authorised by the State agency shall release relevant information that is necessary to protect the public concerning a specific person required to register under the section, except that the identity of a victim of an offence that requires registration under this section shall not be released.”

° **The Jacob Wetterling Act**

42.7.3.12 The Jacob Wetterling Act provides that registration information is initially to be taken and submitted by the court or a prison official. The purpose of this requirement is to ensure that a responsible official will obtain registration information near the time of release and transmit it to the registration agency. Some states in the United States assign this responsibility to probation or parole officers, who have functions relating to correctional matters or the execution of sentences.

42.7.3.13 The Jacob Wetterling Act provides that, if a person required to register is released, then the responsible officer must obtain the registration information and forward it to the registration agency within three days of receipt. Many states, however, do not wait until the day of release to obtain the registration information, but require offenders to provide this information some period of time prior to release.

42.7.3.14 The Act requires registrants to report changes of address within ten days. Most state registration programmes do not require registrants to send change of address information directly to the state registration agency but provide that this information is to be submitted to a local law enforcement agency or other intermediary, which is then required to forward it to the state registration agency.

42.7.3.15 The Act requires that the state registration agency notify local law enforcement agencies concerning the release or subsequent movement of registered offenders to their areas. It also requires periodic address verification for registered offenders, through the return of non-forwardable address verification forms that are sent to the registered address. The Jacob Wetterling Act further requires that released convicted sexual offenders in the relevant

offence categories be subject to registration and periodic address verification for at least 10 years. This requirement is unqualified, and states the persons who are not in compliance if they allow registration obligations to be waived or terminated before the end of this period.

42.7.3.16 The Jacob Wetterling Act prescribes more stringent registration requirements for a subclass of offenders characterised as ‘sexually violent predators’. The determination whether a person is (or is no longer) a ‘sexually violent predator’ is made by the sentencing court. The Act further requires registration by persons convicted of a ‘criminal offence against a victim who is a minor’ and one of the clauses in the Act’s definition section covers ‘criminal sexual conduct towards a minor’. This includes two clauses relating to solicitation offences: ‘solicitation of a minor to engage in sexual conduct’ and ‘solicitation of a minor to practice prostitution’. The Act also requires registration by persons convicted of a ‘sexually violent offence’. It essentially provides that the term ‘sexually violent offence’ means aggravated sexual abuse and sexual abuse as described in federal law or the state criminal code.

42.7.3.17 The Jacob Wetterling Act prescribes criminal penalties for persons in the relevant offence categories who knowingly fail to register or keep registration information current.

° **The Pam Lychner Act**

42.7.3.18 Subsequent to the enactment of Megan’s Law, the U.S. Congress enacted additional legislation relating to sex offender tracking and registration in the **Pam Lychner Sexual Offender Tracking and Identification Act** of 1996.⁴⁷ The Pam Lychner Act includes, *inter alia*, amendments to the Jacob Wetterling Act affecting the duration of registration requirements, sexually violent predator certification, fingerprinting of registered offenders, address verification, and reporting of registration information to the FBI.

° **A review of U.S. State laws on sex offender registration**

42.7.4 All fifty states in the U.S. now require sex offenders to register; more than half passed their laws since 1994. These sex offender registration laws require offenders to supply their addresses, and other identifying information, to a state agency or law enforcement.

47 Pub. L. No. 104 - 236, 110 Stat. 3093.

Generally, the state obtains the offender's name, address, fingerprints, photo, date of birth, social security number and criminal history at the time of registration. Place of employment and vehicle registration are also frequently collected. Nine American states also collect blood samples for DNA identification.

42.7.4.1 Most American states do not require juvenile offenders to register (except where convicted under adult statutes).

42.7.4.2 The duration of the registration requirement ranges from the length of probation or parole to life, and is typically ten years or longer. Fifteen states require life long registration. Most of these states allow the offender to petition the court for relief from this duty after a specified time period. Seven other states, while not specifying lifetime registration, require some offenders to petition the courts, or the court may cancel the registration requirement. A typical example of this petition process is found in Mississippi's legislation, which reads as follows:

Any person having a duty to register under section 1 of this act may petition the circuit court to be relieved of that duty...The court shall consider the nature of the registrable offence committed and the criminal and relevant non-criminal behaviour of the petitioner both before and after conviction, and it may consider other factors. The court may relieve the petitioner of the duty to register only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of this act.

42.7.4.3 Fourteen states in the U.S. vary the length of the registration requirement according to the seriousness of the offences or the number of convictions. Oklahoma allows an exceptional two-year requirement for offenders who complete a state-approved sex offender treatment programme - otherwise, the duration is ten years. In Georgia and Indiana, registration ends with completion of the parole or probation. In Minnesota, registration ends at ten years or upon completion of probation or parole, whichever is longer.

42.7.4.4 Addresses must be updated for the registry to maintain its usefulness to law enforcement and the public. Generally, offenders are relied upon to notify authorities of new addresses; most states in the U.S. allow the offender 10 days for change of address notification. Nine states (Alaska, California, Iowa, Maryland, New Hampshire, New York, South Carolina, South Dakota, and Wisconsin) require offenders to verify their registration information annually; New Jersey and Vermont require verification every 90 days, while New York and Pennsylvania require verification for sexually violent predators every 90 days.

42.7.4.5 The penalty for failure to register ranges from a misdemeanour to a felony. For offenders released under community supervision, noncompliance is frequently punished by revocation of parole or probation. California, Delaware, Rhode Island, South Carolina, and Utah impose a mandatory confinement of 90 days for noncompliance. Other states impose confinement ranging from one to five years, and/or a fine of up to \$5,000. Seventeen states increase the severity of the penalty for repeat failures to register. California, Mississippi, Oregon and Washington vary the severity of the penalty according to the severity of the offence for which the offender is registering. Minnesota punishes noncompliance by requiring the offender to register for an additional five years.

42.7.4.6 States have various provisions regarding access to registry information. Sixteen states specify that registry information is available only to law enforcement and investigative authorities. The remaining 34 states allow some type of access, ranging from criminal background checks to full public access and community.

42.7.4.7 California and New York operate "900" telephone numbers that the public may call to determine if a specific individual is registered. In New York, the public may inquire whether a named individual is a registered sex offender. California only allows calls relating to child sexual offenders. In both states the caller must have specific identifying information about the individual in question. In addition, California's Department of Justice makes a subdirectory of sexual habitual offenders available to local law enforcement, who may regulate public access; this subdirectory does not include exact addresses, nor criminal history other than the crime for which the offender is registering.

42.7.4.8 Concurrent with registration laws, some states have passed notification legislation designed to inform communities about convicted offenders. Notification programmes are directed to a number of audiences, including law enforcement, victims and witnesses connected to specific offenders, school districts and citizens in a particular neighbourhood or community.

42.7.4.9 Some states allow victims and witnesses to enroll in a programme which informs them where the offender is located during confinement, and where and when the release occurs. Other states require the departments of prisons or parole to inform local law enforcement when an offender, believed to be dangerous, is released from prison and intends to reside in a specific community. As part of the federal Jacob Wetterling Act, states may allow

law enforcement agencies to release relevant registration information to the public, when necessary for the public's protection. The name of the offender's victim may not be released. Louisiana, New Jersey, Oregon, and Washington already have full-scale community notification programmes for sex offenders judged to pose a serious public threat.

42.7.4.10 Louisiana has a three step notification process, with responsibility placed on the offender: (1) the offender places a two-day notification in the local newspaper, which must include the name, offence committed, and his or her address; (2) the offender provides the same information to the local school superintendent; and (3) the offender sends postcards of notification (containing the same information) to all neighbours within a three-block radius, or a square mile if in a rural area.

42.7.4.11 In New Jersey, the county prosecutors where the offender was convicted and where the offender plans to reside, together with the appropriate law enforcement agencies, assess an offender's risk of re-offending. The county prosecutor where the offender will reside consults with the local law enforcement agency to determine the means of providing community notification for high risk sex offenders. Organisations in the community including schools, churches and youth organisations are notified of moderate risk offenders.

42.7.4.12 Oregon's notification procedures can include flyers, news articles, and 'stop' signs posted on the offender's residence. These signs, which resemble actual stop signs, read: 'Stop, Sex offender Residence', and include the address and phone number of the Department of Corrections. The supervising probation or parole officer in the county where the offender resides 'develop[s] a notification plan based on the offender's crime / behaviour and the make-up of the community.

42.7.4.13 Washington's community notification laws authorises law enforcement to release 'relevant and necessary' information about convicted sex offenders to the public. Notification activities have included front-page news articles, flyers and posters, and canvassing neighbourhoods. Some newspapers print the names of sex offenders registered in their counties.

42.7.4.14 Most state registration laws were enacted fairly recently and have not been evaluated. Only California and Washington State have produced written evaluations. A 1988 study by the California Department of Justice found that adult sex offenders released from

prison in 1973 and 1981 had compliance rates of 54 and 72 percent, respectively. In 1991, Washington's compliance rate was 76 percent. As of July 1996, 81 percent of sex offenders required to register have done so. Thus, in both California and Washington, approximately three out of four sex offenders required to register actually did so. This compliance rate is much higher than predicted by critics of registration laws.

42.7.4.15 In addition to measuring compliance, California's 1988 study looked at the recidivism rates of released sex offenders, and examined the extent to which such registration actually assists in the investigation of sex crimes. A 15-year follow-up study was conducted of sex offenders first arrested in 1973. Nearly half (49 percent) of this group were re-arrested for some type of offence between 1973 and 1988, and 20 percent were re-arrested for a sex offence. Those whose first conviction was rape (by force or threat) had the highest recidivism rate - 64 percent of any offence and 25 percent for a sex offence.

Significantly, high rates of voluntary compliance are not essential for a registration law to have enforcement benefits. When a complete list of released sex offenders, who *should* have registered, is routinely produced by the state prison system, law enforcement can choose whether to actively pursue those not in compliance, or to reserve non-compliance charges for offenders whose behaviour draws attention of law enforcement. In several Washington State counties, local authorities conduct thorough background checks on all released sex offenders and use the information - regardless of compliance - as an investigative tool.⁴⁸

42.7.4.16 Based on the responses of 420 criminal justice agencies, the California study found that a large proportion of criminal justice investigators believed that the registration system was effective in locating released or paroled sex offenders and apprehending suspected sex offenders. For this reason, the vast majority of those surveyed believed that the registration requirement should be continued and approximately half of the respondents believed that registration deterred offenders from committing new sex crimes.

42.7.5 New South Wales

42.7.5.1 In New South Wales, the **Child Protection (Offenders Registration) Act 2000** provides for a register of offenders. A 'registrable person' is defined in the Act as a person

48 Scott Matson and Roxanne Lieb **Sex Offender Community Notification: A Review of Laws in 32 States**, Washington State Institute for Public Policy, April 1996, p. 11.

whom a court has at any time found guilty and sentenced in respect of a registrable offence,⁴⁹ with certain exceptions.⁵⁰ Section 4 of the Act provides that as soon as practicable after a registrable person is sentenced, the sentencing court must give written notice to the person concerned of that person's reporting obligations and the consequences that may arise if that person fails to comply with those obligations. The sentencing court is also obliged to give written notice to the Commissioner of Police and the supervising authority for that person. The register therefore only applies to certain convicted sexual offenders.

42.7.5.2 The Act obliges a registrable person to supply to the Commissioner of Police personal information such as his or her name(s), date of birth, address(es), details of employment (where appropriate), 'the make, model, colour and registration number of any motor vehicle owned by, or generally driven by,' the person, and the nature of the offences by reason of which the person is a registrable person.⁵¹ Before leaving New South Wales, a registrable person must notify the Commissioner of Police of that fact and such notice must indicate each state, territory or country to which that person intends to go, the approximate dates during which the person intends to be in each such state, territory or country, and his or her possible return date.⁵²

42.7.5.3 In the case of a registrable person found guilty of a Class 1 offence (the primary offence), the registrable person's reporting obligations continue for **ten years** if the finding of guilt relates to a single Class 1 offence, or if the registrable person has at the same time or at any earlier time been found guilty of another Class 1 offence or a Class 2 offence, being an offence arising from the same incident as the primary offence.⁵³ The reporting obligations continue for **15 years** if the registrable person has at the same time or at any earlier time been found guilty of a Class 2 offence, where the other offence is not an offence arising from the same incident as the primary offence, or if the registrable person has at the same time been found guilty of another Class 1 offence, where the other offence is not an offence arising from the same incident as the primary offence, or if the registrable person has at an earlier time been

49 A registrable offence is a Class 1 or Class 2 offence. Both classes are defined in the Act and Class 1, for instance, includes murder and sexual intercourse with a child.

50 The exceptions relate, for instance, to single Class 2 offences where imprisonment or community service orders were not imposed, to persons whose convictions or findings of guilt has been quashed or set aside, to a child who has been found guilty of a single offence, etc.

51 Section 9(1).

52 Section 11.

53 Section 14(2).

found guilty of another Class 1 offence, where the primary offence was committed before the finding of guilt for the other offence. However, the reporting obligations continue **for the rest of the registrable person's life** if the registrable person has at any earlier time been found guilty of another Class 1 offence, where the primary offence was committed after the finding of guilt for the other offence.⁵⁴ Other time frames are prescribed in the case of a registrable person being found guilty of a Class 2 offence.⁵⁵

42.7.5.4 The register of offenders is to be established and maintained by the Commissioner of Police.⁵⁶ The following information must be recorded for each person under a reporting obligation:

- the person's name and other identifying details;
- the date on which the person ceased to be in government custody;
- any other relevant personal information provided; and
- details of any proposed absence from New South Wales.

42.7.5.5 The Act does not specify who will have access to the information on the register and it is assumed that this aspect will be dealt with in the regulations.

42.7.6 **The introduction of registration and community notification obligations on sexual offenders in South Africa**

42.7.6.1 There is no provision for a register of sexual offenders in either the **Child Care Act**, 1983, or the **Sexual Offences Act**, 1957. Regulation 39B of the **Child Care Act**, 1983 does however, provide for a National Child Protection Register.⁵⁷ The relevant part reads as follows:

(1) The Director-General shall keep a National Child Protection Register for the sole purpose of protecting children as provided for in this regulation in which the following shall be entered:

(a) All notifications, in terms of section 42(1) of the Act, of possible ill-treatment of or deliberate injury to children which are transmitted to the Director-General

54 Section 14(2).

55 Section 14(3).

56 Section 19(1).

57 Inserted by GN R 416 of March 1998.

- together with the corresponding reports as contemplated in regulation 39A(2)(c),⁵⁸
- (b) all convictions as contemplated in regulation 39A(4)(a); and
 - (c) all determinations of the children's court as contemplated in regulation 39A(4)(b).
- (2) The register referred to in sub-regulation (1) shall contain:
- (a) Identifying details of the child concerned;
 - (b) particulars of the place, date and time of the incident, including any children's home, place of care, place of safety, school of industries or shelter;
 - (c) particulars of the parent, guardian, foster parent or other custodian of the child;
 - (d) the nature and extent of the ill-treatment of or deliberate injury inflicted on the child;
 - (e) identifying details and address of the convicted perpetrator;
 - (f) details of the relationship between the child and the perpetrator; and
 - (g) details of the court, case number, conviction and sentence in respect of such perpetrator.

42.7.6.2 The Director-General of Social Development may approve that the register be used for *bona fide* research purposes such as the collection of information on the occurrence, distribution and prevalence of cases of ill-treatment of or deliberate injury to children, or of the physical, emotional or sexual abuse of children, and of the various interventions made in such cases.⁵⁹

42.7.6.3 The National Child Protection Register is presently being put into operation by the national Department of Welfare.

42.7.6.4 Although the National Child Protection Register will include details of the **convicted** perpetrator, it essentially follows the child victim and does not track the offender. Its sole purpose is to protect children and not adults. It must also be realised that the National Child Protection Register is not limited to the sexual abuse of children, but goes much wider. Besides the data in the register being used for research, it is not clear what the purpose of the register is or how it will protect children.

42.7.6.5 The issue of mandatory reporting of child abuse and neglect falls within the mandate of the Project Committee on the Review of the Child Care Act and it was decided at a joint meeting held in Durban on 22 October 1999 that that Committee will address this issue.

58 Regulation 39A provides for the notification of suspicions of ill-treatment of or injury to children and of children suffering from nutritional deficiency diseases.

59 Regulation 39B(3).

We therefore refrain from making any recommendations in this regard. However, the Project Committee on Sexual Offences certainly is at liberty to make recommendations on a register for sexual offenders or a register for victims of sexual offences, which it will do in due course.

42.7.6.6 It is also worth pointing out that the South African Police Service through its Criminal Records Centre is already maintaining a national register of all convicted offenders, including convicted sexual offenders. Two police forms are critical in this process: The SAP 69 and the SAP 62. The SAP 69 is a record of a person's previous criminal convictions which is used in court as *prima facie* proof of a person's previous convictions in the sentencing stage. The SAP 69 contains the person's name(s), the case number and court, and details about the offence(s) committed and sentence(s) imposed. The information is sometimes cryptic and as there is no general category of 'sexual offences' it might not be possible to use the SAP 69, in its present form, to compile and maintain a register of sexual offenders.

42.7.6.7 The SAP 62, on the other hand, contains detailed information regarding the *modus operandi* of the offence committed. This form is filled in by the police and a copy is sent to the Department of Correctional Services who uses it in determining placement in programmes and treatment of offenders. Completion of this form generally leaves much to be desired.

42.7.7 **Notifying the police or the community on the release from prison or placement on parole of sexual offenders: Evaluation and recommendations**

42.7.7.1 There are several arguments for and against community notification and registration programmes. Arguments in favour are:

- (i) Creating a registry assists law enforcement as it is a tool that can be used both to solve crimes and prevent them.
- (ii) Registration laws may establish legal grounds to detain known offenders who do not comply with registration and are later found in suspicious circumstances.
- (iii) Deterring sex offenders from committing new offences because once registered, offenders know that they will be monitored. Some believe that the possibility of being registered may discourage first-time sex offenders.
- (iv) Offering the community information is intended as a means of public protection, particularly for parents to protect their children.

42.7.7.2 Arguments against are:

- (i) Registration creates a false sense of security. The public may rely too heavily on the register, not realising that the majority of sex offenders never appear on registration lists. The reasons for this are numerous and include low reporting and conviction rates, plea bargaining, failure by sex offenders to register, etc.
- (ii) By forcing sex offenders to register, society sends a message to these individuals that they are bad and not to be trusted. Such a message can work against efforts to rehabilitate offenders and can encourage further criminal behaviour. For example, "If society thinks I'm a permanent threat, I guess I am and there's nothing I can do to stop myself".
- (iii) Sex offender registration encourage sex offenders to evade the attention of the law and accordingly, not comply with the law and so make the investigation of offences more difficult.
- (iv) Registration programmes are inconsistent with the goals of a society committed to protecting individual liberties. Released sex offender's have paid their debt to society. This argument does not address the issue that part of the offender's debt to society may be long term registration.
- (v) Registration of sex offenders implies that these offenders are the most dangerous, whereas other types of offenders present similar or greater risks - for example, a released murderer or drug dealer.
- (vi) Registration will encourage public vigilantism. Where the registration list is public, the community may threaten to take action against offenders or their family members.
- (vii) If made public, a list of registered sex offenders may inadvertently disclose the identity of victims, particularly in cases of incest.
- (viii) The cost of creating a list of sex offenders and maintaining it is enormous. Funds could better be spent on such areas as treatment of incarcerated sex offenders to reduce the risk of re-offending or intense supervision of a smaller group of the most serious sex offenders, such as rapists. This is a strong argument when one bears in mind that a considerable number of sex offenders are never registered.⁶⁰
- (ix) Disclosure of names of sex offenders may create a threat of public disorder;
- (x) It may lead to the possibility of attacks on innocent persons who resemble the offender;

60 The arguments for and against referred to above where drawn from Matson S and Lieb R **Sex Offender Community Notification: A Review of Laws in 32 States** Washington State Institute fro Public Policy April 1996 at p2-4.

- (xi) It may cause damage to the property of the offender or others.
- (xii) It may cause the offender to disappear underground and so outside the system of monitoring and rehabilitation.

42.7.7.3 Community notification and registration have been subject to challenges on constitutional grounds, most frequently based on the argument that notification represents additional punishment. In 1996, injunctions, or temporary restraining orders, were in place in Alaska, New Jersey and New York and were under appeal. In Washington State, an injunction is in effect for specific individuals and is also being appealed.

42.7.7.4 The majority of US courts that have dealt with the issue of registration and notification systems have held that systems like those contemplated by the Jacob Wetterling Act do not violate released offenders' constitutional rights. A few courts, however, have found that certain provisions of the state systems violate (or possibly violate) the US Constitution.⁶¹

42.7.7.5 There has been extensive litigation concerning whether aspects of New Jersey's community notification program violate due process or *ex post facto* constitutional guarantees as applied to individuals who committed the covered offense prior to enactment of the notification statute. The New Jersey Supreme Court, in **John Doe v Poritz**,⁶² upheld the New Jersey statute, although it imposed certain procedural protections under federal and state law. In **Artway v Attorney-General of New Jersey**⁶³ the district court held that retroactive application of the notification provisions of New Jersey's Megan's Law violated the *ex post facto* constitutional clause. On appeal, however, this part of the district court's decision was vacated on ripeness grounds.⁶⁴ It was referred back to the district court which then ruled, in a class action case, that the notification provisions of the New Jersey law, as modified by the New Jersey Supreme Court's decision in **John Doe**, are constitutional, even when retro-actively applied.⁶⁵

61 See further www.usdoj.gov/vawo/jwguid2.htm for case law on this point.

62 142 N.J. 1, 662 A. 2d 367 (1995).

63 876 F. Supp. 666 (D.N.J. 1995).

64 81 F. 3d 1235, rehearing denied, 83 F. 3d 594 (3d Cir. 1996).

65 **W.P. v Poritz** 931 F. Supp. 1199 (D.N.J 1996), appeal pending.

42.7.7.6 There is ongoing litigation over the validity of notification systems, and particularly the validity of their retro-active application, in other states in the United States.⁶⁶ The most compelling and successful argument mounted by offenders challenging various states' versions of Megan's Law has been the argument that, as applied to offenders convicted prior to the law, there was a violation of the *ex post facto* clause of the United States Constitution.⁶⁷ This clause has been interpreted by the United States Supreme Court as proscribing legislatures from retro-actively altering the definition of crimes or increasing the punishment for criminal acts.⁶⁸

42.7.7.7 **We do not recommend the introduction of community notification legislation along the lines of Megan's law in South Africa.** We believe in an integrated approach and believe punishment and treatment of the sexual offender should be so closely linked that it need not be necessary to trace sexual offenders once released from prison or once they complete their treatment programme. However, once a sexual offender has served his or her sentence (which should, in our opinion, include a substantial treatment portion) the offender has paid his or her dues to society and is a free person. To subject such a person to notification and registration requirements after the expiry of his or her sentence, seems to be constitutionally suspect. Indeed, if such an offender still poses a threat to society after serving a prison sentence and receiving treatment, the criminal justice system has failed that person. We also warn of the danger and the false sense of security inherent in notification and registration systems. As previously stated, no notification or registration system can predict criminal behaviour. There is also a real threat that communities might take the law in their own hands and cleanse neighbourhoods from offenders, even on the slightest of rumours.⁶⁹

42.7.8 **Registers of sexual offenders: Evaluation and recommendation**

66 See, for instance, **Doe v Pataki** 940 F. Supp. 603 (S.D.N.Y. 1996) (enjoining retro-active application of community notification as an *ex post facto* punishment); **Doe v Weld** 1996 WL 769398 (D. Mass. December 17, 1996) (declining to enjoin retro-active application of community notification provisions); **Stearns v Gregoire** Dkt. No. C95-1486D (W.D. Wash. April 12, 1996); **Opinion of the Justices** 423 Mass. 1201, 668 N.E. 2d 738 (1996) (advisory opinion that the community notification provisions are constitutional, even as retro-actively applied) and the decisions discussed at:

<http://incestabuse.miningco.com/health/incestabuse/library/weekly/aa081197.htm> .

67 Article 1, section 10.

68 **California Department of Corrections v Morales** 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); **Collins v Youngblood** 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

69 See also 'Megan's Law accomplishes nothing other than the promotion of vigilantism' at www.netscape.org/users/herald/issues/020598/aclu.f.html .

42.7.8.1 The introduction of a register of sexual offenders and the imposition of community notification obligations on sexual offenders have been topical in South Africa for some time now.⁷⁰ The debate has not been focussed and it is not always clear what the purpose or scope of a register should be. For instance, it has been argued that a register should not only contain the details of **convicted** sexual offenders, but **alleged** sexual offenders as well. Besides the constitutional arguments against including **alleged** offenders on a register, this also begs the question of what should be done once the offender's name is placed on the register.

42.7.8.2 Linked to this is lack of clarity as to what the purpose of such a register of sexual offenders (whether convicted or not) should be. If deterrence is the objective of a register, it makes no sense to restrict access to the information on the register. However, should access not be regulated, this may (as has recently happened in the England)⁷¹ lead to witch hunting and people taking the law into their own hands.

42.7.8.3 **We recommend extended use of the existing SAPS Criminal Records Centre. We believe it is possible, by adapting the SAP 69 and SAP 62 forms and grouping the relevant sex offences under a general category, to effectively use the existing SAPS Criminal Records Centre as the base for a register of convicted sexual offenders. Besides presenting a record of previous convictions, it should be possible for such a register to be used for purposes of preventing unsuitable persons from working with children or screening potential job applicants for position that give them access to children. As such the Commission is not in favour of creating a *new* register or index of *convicted* sexual offenders.** However, it should be clear that an integrated approach such as that proposed by the UK Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust discussed below, will be far more effective and useful.

70 The previous Minister for Welfare and Population Development, Geraldine Fraser-Molekethi already announced in 1997 that her Ministry was considering the establishment of a register of sexual offenders. See also the proceedings of a perpetrators' workshop held by the Department of Welfare and Population Development in Pretoria on 31 March 2000. Some private individuals are also campaigning for the establishment of a national sex offender register in South Africa: See 'Call for register of paedophiles' **Pretoria News**, 1 August 2000, p. 4.

71 See, for instance, 'A tabloid horror story - Exposing paedophiles is no protection' **The Guardian**, 24 July 2000; 'Tabloid's naming of paedophiles condemned by police chief' **The Guardian**, 24 July 2000; 'Sarah Payne: Turning a tragedy into a sales opportunity' **The Guardian**, 19 July 2000.

42.7.8.4 **The Commission does not support any register or index of sexual offenders with the sole function to blame and shame sexual offenders.** It is unconstitutional to try (and therefore punish) a person twice for the same offence. Such a register will surely encourage vigilantism. It has no justification, no rehabilitative effect, its deterrent value is suspect, and will drive 'predatory' sexual offenders further underground, while at the same time giving 'clean' communities a false sense of security.

42.7.8.5 **The Commission is also not in favour of a register of *alleged* sexual offenders, even though we recognise that in some cases 'guilty' sex offenders do go free on mere legal technicalities.** That is the price we pay in a democracy with a justiciable bill of rights where the rule of law prevails. It is fairly common at present in disputed divorce actions and in nearly all contested custody, access, maintenance or family disputes where children are involved, that some kind of allegations regarding sexual abuse or impropriety are made.⁷² From a practical point alone, it will be impossible to implement and maintain.

42.8 **Preventing unsuitable persons from working with children**

42.8.1 In the United Kingdom, an Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust⁷³ has proposed the introduction of an integrated system for identifying people unsuitable to work with children. The Working Group has proposed that there should be a central access point (sometimes called a one-stop shop) and that this access point should be the Criminal Records Bureau. It is further recommended that the integrated system should identify people as unsuitable to work with children:

- have committed specified criminal offences;⁷⁴

72 Personal communication with the office of the Family Advocate: Pretoria.

73 For its report, see www.homeoffice.gov.uk/cpd/sou/wgpup.htm .

74 Under administrative arrangements between the Home Office and the Association of Chief Police Officers, criminal record checks for the purpose of vetting those seeking work with children are in the main only available to those employed in the public sector. Checks are restricted to those who are applying for work which will give them substantial unsupervised access, on a sustained or regular basis, to children under the age of 16 years, or children under 18 years who have special needs. For residential care staff the checks can be carried out when such access will be to children under the age of 18 years who are looked after by the local authority. Certain national voluntary child care organisations also have access to criminal record checks through their membership of the Voluntary Organisations Consultancy Service.

- are included on the DfEE List 99⁷⁵ for misconduct related to children; or
- are included on the DH Consultancy Index⁷⁶ as unsuitable to work with children.

42.8.2 The Working Group recommends that it should be a criminal offence for a person deemed unsuitable to apply for work, accept work or continue to work with children. Access should be allowed for all those who, by virtue of section 120 of the UK **Police Act** 1997, are authorised to countersign applications for criminal records certificates by those wanting to work with children.⁷⁷ This would cover all those registered to receive criminal record checks in relation to working with children.

42.8.3 The Working Group further recommends that relevant education and child care bodies, including schools and children's homes, should continue to be required to report individuals to be considered for inclusion on List 99 or the Consultancy Index as part of the

75 This List is held and operated by the Department for Education and Employment. Persons on the List are barred or restricted in their employment as a teacher or as a worker with children or young persons on misconduct or medical grounds. The List contains the names, dates of birth, and teacher reference numbers of persons whose employment has been barred or restricted. If a person's employment is restricted, the entry shows the types of employment in which he or she is permitted to work. People barred on misconduct grounds are listed separately from those barred on medical grounds, but no details of misconduct are given. Barring is automatic where the individual, on or after 1 November 1995, has been convicted of one or a number of specified sexual offences which was committed against a person under the age of 16 years. Access to the List is strictly limited to individuals responsible for checking the suitability of applicants. It should be emphasised that not all those on the list are perceived to be a danger to children.

76 The Department of Health operates the Consultancy Index, which applies to England and Wales, on an advisory basis whereby local authorities, private and voluntary organisations can check the suitability of those they propose to employ in a child care post. The service notes convictions against those who (at the time of convictions) are or were in child care work; it also notes the names of persons formerly in such work who have been dismissed or who have resigned or moved to a different post away from working with children in circumstances where a child has been harmed or put at risk. The object is to make sure that, as far as possible, unsuitable persons are not appointed to positions involving contact with children or responsibility for them. The type of jobs covered are those where the person would have substantial unsupervised access to children particularly in a residential setting.

77 Part V of the **Police Act** 1997 makes provision for three different levels of criminal record check and the issue of three types of certificates: A **criminal conviction certificate** which would be issued only to individuals who would be able to choose whether to show it to employers or anyone else who wished to see it; a **criminal record certificate** which would be available for posts or purposes which are exceptions to the **Rehabilitation of Offenders Act**. Groups eligible to apply for this certificate would include those whose duties involve regular contact with children and young people under the age of eighteen and elderly, sick or handicapped people, those involved in the administration of the law and those employed in certain other sensitive areas and professions. An **enhanced criminal record certificate** is available for those applying for positions which would involve regular caring for, training, supervising or being in sole charge of persons under eighteen, for certain statutory licencing purposes and for those being considered for judicial appointment.

requirements imposed by the respective Secretaries of State in respect of those lists; the individual concerned should have the right to make representations and challenge the information before his or her name was finally included on the relevant list as part of the processing of the information within the respective department.

42.8.4 The Working Group says that there should be no requirement imposed on employers at large to make the checks, but organisations covered by List 99 or the Consultancy Index might in practice have to check the lists as a result of requirements not to employ persons on those lists. The Working Group recommends that the system should be available initially in the context only of work with children, but in principle it should be possible to apply similar arrangements to protect vulnerable adults.

42.8.5 In brief, rather than recommending the establishment of a central register, the Working Group is proposing an integrated system which will clearly identify, through a central access point, people who are deemed unsuitable to work with children, and introduce a new criminal offence to prevent those people seeking to work with children.

42.8.6 **Evaluation and recommendation**

- 1. There is much to be said for introducing such an integrated system in South Africa. It is therefore recommended that a joint task team consisting of members of the Departments of Justice, Education, Labour and Safety and Security be constituted to investigate the possibility of establishing a register of persons unsuitable to work with children and to prepare the necessary legislative framework in this regard.**
- 2. We recommend that the existing system of criminal records held and operated by the SAPS Criminal Records Centre should form the core of such an integrated system and that the Departments of Education, Social Development and Health develop their own systems and lists of people unsuitable to work with children.⁷⁸ These systems and lists should be linked to each other and to the SAPS Criminal Records Centre.**

78 It is possible to think of situations where adults deserve protection (women in jail) and where unsuitable persons (jail-wardens convicted of rape) should not be allowed to work with them.

3. **The screening of employees and managers, who are required to work with or children, for offences committed against children is recommended.**

4. **We also propose that the register of convicted sexual offenders be checked to screen potential job applicants for positions in the child care field.** Obviously not all convicted sex offenders are *per se* unsuitable for work in the child care field, but we can think of nothing more dangerous than to employ a convicted paedophile as the manager or gardener of a children's home. We propose that such a system be introduced first on a voluntary basis and, perhaps later, on a mandatory basis. The possibility of linking welfare subsidies and grants to the screening of employees and managers of child care facilities is an option worth pursuing. Another possibility is to follow the UK proposal and make it a criminal offence for a person deemed unsuitable to work with children to apply for work, accept work or continue to work with children.⁷⁹ Yet another possibility is to make it a criminal offence for any organisation to employ a person with certain previous convictions in the child care field.

5. **We do not recommend the introduction of any legislative measures to provide for retrospective checks, that is checks made in respect of people who are already in employment.** It will be open to an employer to make such checks on any employee with his or her agreement. It is, however, important to make clear that such checks are no substitute for continued vigilance and monitoring against abuse. There are also issues of both practicality and enforcement. On practicality, a blanket approach to checking all existing employees could quite simply bring any system to a halt, and the Commission recommends against it on these grounds alone. On enforcement, there may be occasions where an employee has submitted a misleading or inaccurate application to obtain the job some time previously, or where what is revealed is sufficiently grave to justify action in itself. But without any present cause for concern, this is an area where any employer would need to tread extremely cautiously. **We accordingly recommend that organisations should only make checks on existing employees after careful consideration as to whether this is justified.**

79 See the **Report of the Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust**, par 5.41 at www.homeoffice.gov.uk/cpd/sou/wgpup.htm .

6. There is also the question of whether organisations should set in place a system of regular checks for individuals subsequent to their appointment. Again it needs to be emphasised that such checks are no substitute for continued vigilance and monitoring against abuse. We see this as a matter of good practice and do not make any recommendations in this regard.

CHAPTER 43**THE TREATMENT OF SEXUAL OFFENDERS****43.1. Introduction**

43.1.1 It is very difficult to separate the treatment of offenders from the treatment of victims, the calls for a register for sexual offenders, diversion and diversion options for sexual offenders, the sentencing of offenders, other sentencing options, the use of victim impact statements, victim compensation, the use of a child protection conference, etc. The aspects are all inter-related and should ideally be dealt with as a whole. Because of practical considerations, however, it was decided to deal with these aspects individually.

43.1.2 Imprisonment on its own and other conventional forms of punishment are ineffective means of rehabilitating sexual offenders. After release from prison or other correctional services where treatment is not offered, as is usually the case, sexual offenders often return to the community with strong feelings of anger. This is exacerbated by their own victimisation in prison and sometimes by a need to avenge the time spent in prison as they lack understanding of the impact of their own behaviour on the victim. Appropriate treatment programmes would alleviate these strong feelings of anger and assist in the development of insight into the impact of their abusive behaviour on victims and communities, and will also help develop alternative behaviours and ways of managing sexual and angry impulses. Treatment of the sexual offender is thus a long term preventive activity.

43.1.3 Ideally, the treatment of the sexual offender should start as soon as the offending behaviour comes to light. This is often not possible and there are a number of possibilities with regard to the structuring of rehabilitation programmes:¹

43.1.3.1 (a) *The offender submits voluntarily for treatment.* This can happen at anytime and there are a small number of community based therapists and rehabilitation programmes available. A disadvantage is that the offender who obtains treatment voluntarily cannot be compelled to remain in treatment for the time period the therapist might assess to

1 See also Judith V Becker 'Offenders: Characteristics and Treatment' 1994 (vol. 4 no. 2) **Sexual Abuse of Children** 176 at 185 on the mechanisms for getting child molesters into treatment.

be necessary for rehabilitation to be effective. The advantage is that if the offender attends voluntarily, he or she may be better motivated to fully utilise the rehabilitation opportunity.

43.1.3.2 (b) *Treatment may be prescribed by a 'diversion' contract or as part of the sexual offender's sentencing package'.²* Diversion can take place in the pre-trial or post-conviction stage. Giving teeth to a pre-trial 'diversion contract' to ensure compliance is difficult, but not impossible. The terms of the 'diversion contract' obviously become easier to enforce when it forms part of a structured 'sentencing package'. For example, the offender may be required to attend and participate in a rehabilitation programme as part of a sentence to correctional supervision, a sentence to probation, a sentence to imprisonment, a condition of parole or as a condition of a suspended sentence.

43.1.3.3 The advantages of this option include the following:

- There will be a monitoring process in place to ensure that the rehabilitation programme is attended.
- Conditions that support the rehabilitation process and ensure the continued protection of children in families and communities may also be put in place. For example, the sexual offender may be required, for the duration of the rehabilitation process, to live in a residential environment away from the family and children involved. The offender may further be required to refrain from using or abusing alcohol and drugs, or to undergo dependency rehabilitation where this may have contributed to the lessening of controls on abusive sexual behaviour and thus have contributed directly or indirectly to the sexual offence committed.
- The sentencing 'package' can also provide for community service by the sexual offender. Community service can be an important component of the rehabilitation process as it underlines the concept that the offender has harmed and damaged the victim and society as a whole. Well placed community service gives the offender the opportunity to make a contribution to 'restoring balance'. However, it must be noted that community service for the offender who has committed an offence(s) against children should not be placed in any setting in which contact with children is facilitated.

2 A limited number of these programmes are in existence. See, for example, the Saystop programme developed in the Western Cape.

43.1.3.4 (c) *The sexual offender may receive treatment in prison by staff from the Department of Correctional Services.* Formal treatment programmes for sexual offenders in prisons are now being developed. In some prisons release on parole is no longer considered unless the sexual offender has undergone assessment and/or treatment for his or her sexual offending behaviour. Without a report from a Correctional Services social worker or psychologist, the offender is not released on parole. However, staff undertaking the assessment or treatment of the sexual offender may not have undergone any specific training in this area of rehabilitation. A further problem is that continuance in a sex offence specific rehabilitation programme in the community may not necessarily be a condition of parole.

43.1.3.5 The prison environment itself may not be conducive to developing and supporting changes in sexual offending behaviour. Prisons are notoriously overcrowded, and there is little control over the sexual behaviour of prisoners. Furthermore, sexual offenders are particularly targeted sexually by other prisoners who may commit similar or even more serious sexual assaults on sexual offenders as a punitive measure. These experiences may reinforce the very behaviours which are targeted for change, as well as contribute to denial of the sexual offence by the sexual offender as a means of defending himself or herself against the sexual assaults of other prisoners. It is also noted that the sexual practices of prisoners contribute to the spread of HIV/AIDS among sexually active prisoners. This places future victims of untreated offenders who are HIV positive at huge risk of not only being the victims of sexual assault, but of contracting the HIV virus.

43.1.3.6 There is a need to provide for the monitoring of the sentencing magistrate's treatment order. At present the sentencing magistrate may order rehabilitation as part of a prison sentence, but this may not be followed through by the prison staff, due sometimes to the lack of resources in the prison to which the offender is admitted, or the lack of insight of the prison staff as to the need for rehabilitation of the sexual offender.

43.1.3.7 (d) *The sexual offender may receive treatment once released from prison, either as part of his or her parole conditions or as part of the original 'sentencing package'.* The desire to link the release or conditional release of a sexual offender from prison is motivated by the need to monitor the behaviour of the offender in the community. It must be realised, however, that a person who has served his or her sentence has paid his or her dues to community and cannot be forced *ex post facto* to undergo treatment or rehabilitation unless it

was required in terms of the original sentence.³ The attendance of a treatment or rehabilitation programme by a sexual offender after release from prison or as part of a sentence of correctional supervision must therefore form an essential element of the original sentence imposed by the court.

43.2 Submissions to the Issue Paper

43.2.1 Some workshop participants found the idea of treatment or rehabilitation of sexual offenders in general unlikely. This response was not surprising in view of the call for longer and more severe sentences for sexual offenders. Others could not contemplate why criminals should receive first-class treatment and rehabilitation (at great expense to the State) while their victims are left to suffer on their own. At one particular workshop,⁴ participants expressed vocal opposition to the presenters as the treatment of offenders was perceived as being ‘too offender friendly’ and cited, as evidence of the unbalanced view, the fact that the Issue Paper sequentially deals with the treatment of the offender before it deals with the treatment of the victim.

43.2.2 Because of the specific child focus of the Issue Paper,⁵ treatment or rehabilitation programmes for adult sexual offenders were never pertinently raised at the workshops. However, it is a fair assumption to say that there is greater public support for treatment and rehabilitation programmes for young⁶ and first sexual offenders than their adult counterparts.

43.2.3 In a joint submission, the **Women and Human Rights Project, Community Law Centre, UWC, Rape Crisis (Cape Town), and the ANC Parliamentary Women’s Caucus** suggest that the Commission should specifically distinguish youth offender treatment or rehabilitation programmes from adult offender programmes as different forms of treatment or rehabilitation may be required. The respondents submit that further research should be conducted regarding the viability of youth offender programmes.

3 Otherwise it might run foul of the constitutional imperatives which provide that a person may not be tried twice for committing the same offence.

4 Nelspruit, 14 August 1997.

5 See paragraphs 1.2.1 *et seq* of **Discussion Paper 85: Sexual Offences - The Substantive Law**.

6 Under the age of 18 years.

43.2.4 Submissions to the Issue Paper generally were in agreement that (young) sexual offenders should undergo rehabilitation.⁷ There was disagreement as to whether treatment for (young) offenders should be compulsory and at what stage in the criminal proceedings treatment should be initiated, and who should bear the cost burden of such treatment.

43.2.5 The **RP Clinic, Pretoria** says teenage sexual offenders who have committed their first offences in their teenage years, should 'be forced by the court to receive treatment'. The **RP Clinic** says it is best to treat sexual offenders while still young, but limits treatment to first offenders.

43.2.6 In a combined submission by the members from the **SAPS Child Protection Units in KwaZulu** it is stated that the mandatory treatment of sexual offenders must become a national priority to be funded at national level. They submit that treatment in a family court system can start immediately after the criminal charges are instituted and where the accused has indicated that he or she is going to plead guilty. In extra-familial cases and where the accused pleads not guilty, treatment of the offender can only become mandatory once the accused has been convicted. Should treatment of the sexual offender become an alternative to imprisonment, the **SAPS Child Protection Units in KwaZulu Natal** believe that there should be a psychological assessment of the offender prior to the option being exercised. They continue:

Offenders in this country has a high tendency for disappearing after a period and if there is no existing 'unit' available to trace such a 'non-compliant' offender the chance is that the offender can turn up for one or two counselling sessions and then 'disappear'. Such problems can make treatment as an alternative unproductive and the offender will be in the society where he or she can re-offend.

43.2.7 The **SAPS Child Protection Units in KwaZulu Natal** believe the offender should bear the cost of treatment and if the offender can afford it, also the treatment for the victim.

7 Such as, for instance, **Sr MD Potter** of the Agape School for Cerebral Palsied. However, some respondents were very much against the idea. See, for instance, the submission by the **Association for Persons with Physical Disabilities - Northern Cape** who says there should be no treatment of offenders as they should pay for what they did.

43.2.8 The **SAPS Area Commissioner, Legal Services, East Rand**⁸ supports the introduction of legislation to provide for the mandatory counselling and therapy of convicted sexual offenders as part of sentencing.

43.2.9 In its submission, the **South African National Council for Child and Family Welfare** shows that the vast majority of its respondents⁹ favour the introduction of legislation to provide the mandatory counselling of the sexual offender. In response to the question at what stage of the criminal proceedings such an intervention order should follow, various suggestions were made:

- ° from the very beginning;
- ° before sentencing;
- ° after the completion of the (police) investigation;
- ° after the court appearance;
- ° after sentencing and while serving a prison sentence;
- ° on admission of guilt or at arrest;
- ° on conviction if the offender is not a close relation to the child. In intra-familial or incestuous situations, treatment of the sexual offender should start immediately after a panel discussion.

43.2.10 The **S A National Council for Child and Family Welfare** submission also indicates clear support for treatment programmes for sexual offenders, either in a prison setting or as part of correctional supervision or conditions of parole.¹⁰ Again the respondents cover a broad spectrum in making suggestions as to the appropriate stage in the criminal justice process where treatment programmes should be available. The submission of the Council also indicates solid support¹¹ for formal treatment programmes where treatment is to be provided as an alternative to imprisonment. The submission of the **S A National Council for Child and**

8 Submission compiled by **Mr T S Tshabalala**.

9 Of the 42 responses received, 38 were in favour of compulsory treatment of the sexual offender, 3 were against, and 1 did not respond.

10 Of the 42 responses received, 39 were in favour of treatment programs for sexual offenders, either in prison or as part of correctional supervision or conditions of parole, 2 were against, and 1 did not respond.

11 Of the 42 responses received, 32 were in favour of a formal treatment programme as an alternative to prison, 7 were against, and 3 did not respond.

Family Welfare indicates overwhelming support for the idea that the offender should bear the cost of treatment.¹²

43.2.11 **Ms Madonsela** of the **Department of Justice** supports the mandatory counselling of defendants. Counselling should be provided either as part of the sentence or as part of an agreement in an ADR setup. She says the counselling and support of offenders help to reintegrate the offenders back into society. Counselling, if properly applied, should reduce the rate of recidivism. **Ms Madonsela** says that conferencing or ADR is an even better approach. She also submits that treatment programmes must be provided to all sexual offenders, but such treatment should go hand in hand with imprisonment where applicable. She further states that offenders should pay as far as possible not only for their treatment but also for that of victims.

43.2.12 **Dr J M Loffell** of the Johannesburg Child Welfare Society also supports court-ordered assessment and counselling of sexual offenders. She believes it should be possible for a court to make an order, at any stage of the proceedings, that the accused person presents himself or herself for assessment and / or counselling via an approved programme. The court should have access to an inter-disciplinary panel which should make a preliminary assessment of potential risk to the child victim and to other persons prior to the granting of bail. In the case of conviction, such a panel should automatically be called on to conduct an in-depth assessment and provide expert guidance to the court for purposes of sentencing. Dr Loffell states that it is crucial that treatment programmes be put in place, both within the prison system and as an alternative to prison sentencing. These programmes must be formalised and accredited, and offenders should carry the costs of treatment as far as possible.

43.2.13 **Dr Loffell** is also of the opinion that there should be possibilities for the suspension of prosecutions, depending on the type of the offence concerned and subject to compliance with clearly defined conditions, within the parameters of a formal diversion programme. She continues:

Such an option could be suitable for a significant percentage of incest offenders and juveniles, where the person concerned acknowledges responsibility for the crime. Diversion should be possible at an early stage of the proceedings, to allow for speedy entry into an appropriate management programme linked to the protection and

12 Of the 42 responses received, 37 were in favour of the offender bearing the cost of treatment, 3 were against, and 2 did not respond.

treatment of the victim and the latter's family. Again, thorough assessment would be a key ingredient of such an approach.

43.2.14 **Dr Loffell** supports the attachment of a treatment component to parole and to community service orders. She says that some form of restriction on the movements of known offenders so as to restrict their access to children, as is in place in Canada, would be useful. She recognises, however, that locally the lack of resources might be a major problem in this regard. **Dr Loffell** calls for further exploration of possibilities such as electronic monitoring devices for perpetrators of child sexual abuse and systems in terms of which an offender must report at certain places at particular times of the day.

43.2.15 On the other hand, **Mr J J Brits** argues that the "possibility of any rehabilitation in prison is an illusion that is fast disappearing in the mist; on the contrary - criminals consider going to prison as going 'back to school' so that they can sharpen their criminal skills".

43.2.16 **Ms W L Clark** of Verulam Magistrate's Court says a sexual offender cannot be forced to undergo counselling. She argues that if such a person does not have the right attitude, the counselling will be a complete waste of time, not to mention valuable resources. She also states that it is debatable whether or not such counselling is effective in all cases. **Ms Clark** further says that 'intervention orders' of the Victoria (Australian) example should only be granted after conviction and upon the motivated recommendation by a suitably qualified assessor, otherwise it will be open to abuse by offenders seeking an easy way out. **Ms Clark** says that treatment programmes should be provided for sexual offenders if they are willing to participate in them. Obviously they should be available at any stage of the proceedings, provided that participation in such programmes does not influence the course of justice or interfere with the running of the trial. **Ms Clark** makes the point that the court should only make an order for treatment once the accused is convicted. In order to guard against offenders abusing the system, treatment should be an alternative to imprisonment only in exceptional cases and then only when well motivated. **Ms Clark** says the treatment should then be part of a formal programme so as to monitor the participation of the convicted person and to try and safeguard against the option of treatment being abused as a means to get off scot free.

43.2.17 The **Tshwaranang Legal Advocacy Centre** contends that research should be conducted on the effectiveness of counselling of sexual offenders before huge resources are pumped into this initiative. **Tshwaranang** further states that counselling should not be mandatory, but voluntary, and also in association with some form of 'punishment'. If the

offender can afford therapy, he or she should be made to pay for it, otherwise the State should pay.

43.2.18 The then Attorney-General of Transvaal, **Dr J A van S d'Oliveira SC**,¹³ argues that only in exceptional cases where juvenile accused are involved will diversion from the criminal justice system be possible and treatment should then be available without the prosecution proceeding. In all other criminal matters, treatment of the offender can only be considered after conviction as part of a sentence. **Dr d'Oliveira SC** also says that offenders should bear or contribute to the cost of treatment if at all possible. If treatment programmes are to be implemented, the first place to start is within prisons. **Dr d'Oliveira SC** concludes that treatment programmes should only be considered as an alternative to imprisonment 'if proven to be effective'.

43.2.19 **Ms C Wagner** of the Gauteng Department of Social Development submits that treatment should be given to sexual offenders as part of a formal programme. Offenders should as far as possible contribute to the cost of treatment. The **Wes-Kaapse Forum vir Straatkinders** is also of the view that treatment programmes should be provided for sexual offenders at any stage when requested by the offender. If treatment were to be available as an alternative to imprisonment, the Forum says that it should be offered as part of a formal programme on the following basis: "No payment = no treatment = alternative sentence".

43.3 International comparative review

43.3.1 Internationally as well as nationally, although on a very limited basis in the case of the latter, a number of sex offence specific treatment programmes have been developed to rehabilitate the sexual offender with particular reference to sexual offences against children.¹⁴

13 The submission was prepared with the assistance of Adv H M Meintjies, Deputy Attorney-General.

14 See, for instance, Abel, Becker and Skinner 'Behavioural approaches to treatment of the violent sexual offender' in Roth (ed) **Clinical Treatment of the Violent Person** Guildford, 1987; Groth 'Treatment of the sexual offender in a correctional institution' in Greer and Stuart (eds) **The Sexual Aggressor, Current Perspectives on Treatment** Van Nostrand Reinhold, 1983; Claire Holden and Stephanie Hayman (eds) **Treating Sex Offenders in a Custodial Setting** (Proceedings of a Conference 5th March 1997, HMP Brixton) London: The Institute for the Study and Treatment of Delinquency 1997; Charlene Steen and Barbara Monnette **Treating Adolescent Sex Offenders in the Community** Springfield, Illinois: Charles C Thomas Publisher 1989.

This includes programmes for the rehabilitation of adolescents and children who have committed sexual offences. Research into the effectiveness of sex offence specific rehabilitation programmes indicates a superior level of effectiveness over and above imprisonment.¹⁵

43.3.2 In the USA the development of programmes for the treatment of sexual offenders has reached such a level of acceptability that a body the Association for the Treatment of Sexual Abusers (ATSA), was established in 1988. The Association is an international organisation dedicated to the prevention of sexual assault through effective management of sexual offenders. The Association consists of treatment providers and individuals from allied fields. Members strive to incorporate the findings from empirical research into effective evaluation and treatment strategies. ATSA also focuses on primary prevention strategies to avert sexual violence.

43.3.3 The Association believes sexual deviance is a learned and acquired behavioural disorder and treatment is focussed on recognising, changing and managing deviant behaviour and the attitudes that promote it. Sexual deviance is not considered to be a disease that can be cured. The focus of contemporary treatment is on techniques designed to assist sex offenders in maintaining control throughout their lifetime. Therefore treatment include simple, practical techniques that can be used during and after formal therapy.

43.3.4 Sex offender evaluation and treatment requires an approach unfamiliar to most mental health professionals. For example, sex offender therapists exercise substantial control over the lives of clients due to the concern for community protection. Because of this and other differences, standards of practice specific to sex offenders are necessary. The Association recommends accreditation and registration of those who run programmes for sex offenders, and has compiled a comprehensive code of ethics and code of conduct for its members, as well

15 A 1992 study of 560 sex offenders released from Western Australian prisons between 1975 and 1987 showed that there was a 34% chance of re-offending if the sex offender had not received any systematic treatment in prison. This figure increased to 62% for those who had a history of more than one prior offence. The definition of 'recidivism' in this study was conservative, meaning those who returned to prison or re-incarceration and excluding those who had been re-convicted or arrested: Lee et al **The Effectiveness of a Community Based Treatment Program for Sex Offenders** (Paper presented at the First National Conference of Child Sexual Assault, 16 -18 March 1994). See also Howard Barbaree 'Evaluating treatment efficacy with sex offenders: The insensitivity of recidivism studies to treatment effects', Clarke Institute of Psychiatry, University of Toronto and Judith V Becker 'Offenders: Characteristics and Treatment' 1994 (vol 4, no 2) **Sexual Abuse of Children** 176.

as a list of issues to be addressed in treatment programmes. The establishment of this Association was followed up by the development of Standards of Care for Sexual Offenders.¹⁶

43.3.5 In the United Kingdom, the Prison Service Sex Offender Treatment Programme (SOTP) started in 1991 as part of a national prison strategy for the integrated assessment and treatment of sexual offenders. Originally it was intended for the treatment of sexual offenders serving four years or more and was targeted at men who were most likely to offend again. It now aims to take all those who volunteer for the programme.

43.3.6 Group-work has been central to SOTP strategy. By joining a group, the sex offender publicly acknowledges his need to change. The therapy provides a context in which socially acceptable values are conveyed and 'normal' social interactions reinforced. The original SOTP consisted of about 40 two-hour sessions of group work, but this was later extended to 80 two-hour sessions, including additional elements such as role-play. The 'cognitive-behavioural' treatment approach is used: the 'cognitive' aspect of this type of therapy involves recognising the patterns of distorted thinking which allow the contemplation of illegal sexual acts, and understanding the impact which sexually abusive behaviour has on its victims; the 'behavioural' component involves reducing sexual arousal to inappropriate fantasies of forced sexual activities with children or adults.

43.3.7 SOTP programmes are subject to accreditation by an international panel of experts who assess quality of treatment, written outcome reports, tutor availability and management support. Prison governors cannot meet their Prison Service Key Performance targets unless programmes fulfil these criteria.

43.3.8 An evaluation of SOTP in 1998¹⁷ examined twelve treatment groups (about eight men in each) in six prisons in the United Kingdom. It looked at the effect of this programme on offenders' readiness to admit offensive behaviour, pro-offending attitudes, social competence and their knowledge of relapse-avoidance techniques. The following findings are confined to men who had abused children:

16 Coleman and others, *Journal of Offender Rehabilitation*, 1995.

17 Home Office Research, Development and Statistics Directorate **Research Findings No. 79: An evaluation of the Prison Sex Offender Treatment Programme** by Anthony Beech, Dawn Fisher, Richard Beckett and Ann Scott-Fordham, 1998.

- the programme was successful in increasing the level of the child abusers' admittance of offending behaviour;
- pro-offending attitudes, such as thoughts about having sexual contact with children, were reduced as were levels of denial of the impact that sexual abuse has had upon victims;
- overall the programme was successful at increasing levels of social competence;
- of the sample, 67% (53 out of 77 men) were judged to have shown a treatment effect - there were significant changes in all or some of the main areas targeted;
- longer-term treatment (about 160 hours) produced results which held up better after release than short term therapy (about 80 hours), particularly for highly deviant offenders.

43.4 **Analysis and recommendations**

43.4.1 Despite views to the contrary, there seems to be some support for the idea that sexual offenders should receive counselling and treatment. In determining whether treatment has a likelihood of being successful and what form that treatment should take, it is of the utmost importance that the court should call upon experts to advise them in this regard. Provision is already made for the court to receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.¹⁸

43.4.2 Due to the nature of the Issue Paper and its particular focus on children (and child sexual offenders), it cannot be assumed that such support would extend to adult sexual offenders. The question then follows whether a distinction should be drawn between adult and youth sexual offenders.

43.4.3 Obviously treatment and rehabilitation programmes cannot be limited to young sexual offenders or, for that matter, first time offenders. Hardened long term sexual offenders eventually do come out of prison, even when sentenced to life imprisonment. If no attempt was made to instill fundamental behavioural changes in that offender, it should not come as a surprise that that person soon finds himself or herself back beyond bars after committing a similar or worse offence. **The Commission therefore regards it imperative, for the**

18 Section 274 (1) of the **Criminal Procedure Act** 51 of 1977.

protection of victims and the community in general, that courts should consider the treatment and rehabilitation of all sexual offenders as part of the sentencing process.

43.4.4 There is also no particular difficulty with the concept of treatment and rehabilitation of sexual offenders in prison as rehabilitation forms one of the principle aims of sentencing. Indeed, if the rehabilitation and treatment of the offender were not considered, the sentencing court should have considered ways 'to permanently remove the offender from society' and that is not a viable alternative in a democracy. Section 41(6) of the **Correctional Services Act** 111 of 1998¹⁹ now specifically provides that sentenced prisoners may be compelled to participate in programmes and to use services offered (such as literacy programmes, mental health and support programmes) 'where in the opinion of the Commissioner their participation is necessary, having regard to the nature of their previous criminal conduct and the risk they pose to the community'. One cannot think of a more appropriate case for the Commissioner to exercise this discretion to compel prisoners convicted of sexual offences to attend a sex offence specific treatment programme.

43.4.5 The Commission is not blind to the fact that the rehabilitation of offenders, and sexual offenders in particular, in the prison environment is fraught with problems. We are aware of the financial and human constraints under which the Department of Correctional Services must operate, the overcrowding of the prisons, the lack of suitable treatment programs, the difficulties involved in monitoring persons released on parole, etc., but this does not diminish the role of the Department of Correctional Services in any way. However, we are heartened by the passing of the new **Correctional Services Act** 111 of 1998. This comprehensive Act now provides for treatment, development and support services of sentenced prisoners,²⁰ placement under community corrections²¹ through parole, day parole, house detention, community service, etc., and the conditions for such placement, supervision, and monitoring. To give an indication of the detail of the Act and to highlight the conditions relating to community corrections, section 52(1) is quoted. It reads as follows:

19 The Act was assented to on 19 November 1998, but is yet to commence.

20 Section 41.

21 'Community corrections' is defined in section 1 of the Act as 'all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department [of Correctional Services]'.

When community corrections are ordered, a court, Correctional Supervision and Parole Board, the Commissioner or other body which has the statutory authority to do so, may, subject to the limitations in subsection (2) and the qualifications of this Chapter, stipulate that the person concerned-

- (a) is placed under house detention;
- (b) does community service;
- (c) seeks employment;
- (d) takes up and remains in employment;
- (e) pays compensation or damages to victims;
- (f) takes part in treatment, development and support programmes;
- (g) participates in mediation between victim and offender or in family group conferencing;
- (h) contributes financially towards the cost of the community corrections to which he or she has been subjected;
- (i) is restricted to one or more magisterial districts;
- (j) lives at a fixed address;
- (k) refrains from using or abusing alcohol or drugs;
- (l) refrains from committing a criminal offence;
- (m) refrains from visiting a particular place;
- (n) refrains from making contact with a particular person or persons;
- (o) refrains from threatening a particular person or persons by word or action;
- (p) is subject to monitoring;
- (q) in the case of a child, is subject to the additional conditions as contained in section 69.²²

43.4.6 It is trusted that these conditions will be applied in an innovative way by courts and parole boards to ensure that sexual offenders undergo the necessary treatment and rehabilitation programmes.

22 Section 69 provides for additional conditions for children subject to community corrections.

43.4.7 It has been noted that the prison environment may actually be counterproductive to rehabilitation of the sexual offender, and even lead to the development of more abusive and damaging sexual behaviour. In the light of this, if resources are available, sexual offenders should be separated from other prisoners to facilitate acknowledgment of the behaviour and to encourage participation in sex offence specific rehabilitation programmes.

43.4.8 As the prison environment may hamper rehabilitation and treatment of offenders, it has been suggested that treatment and rehabilitation should be made compulsory for sexual offenders released on parole or placed under correctional supervision. This requirement should form part of the original sentence as discussed above. Different variations can obviously apply, but what is usually envisaged is some term of imprisonment, followed by release on parole or correctional supervision linked to the compulsory participation in a treatment programme. The danger with such a structured sentence is that it may be seen as a 'soft option'. This need not be the case as the conditions of parole the terms of the correctional supervision order and participation in the treatment programme may be much more onerous than merely spending time in prison. The advantage is that the offender can contribute to his or her own upkeep and support his or her family by being gainfully employed while undergoing treatment.²³ The disadvantages relate to the insufficiency of proper monitoring mechanisms.

43.4.9 The prison environment may be very damaging to efforts to rehabilitate those sexual offenders who transgressed in the intra-familial context. This is particularly true of those instances where the offender is the primary or sole breadwinner in the affected family. Experience has shown that victims of intra-familial abuse are reluctant to report cases and are even more reluctant to proceed with the criminal case once it becomes clear (or it is made clear to the victim, often through subtle means) that the whole family will suffer should the accused be convicted and sentenced to imprisonment. To allay the fears of the victim and his or her family, and to ensure that the accused receives the necessary treatment, plea-bargaining could be used to secure a conviction in return for an outside-prison sentence. Obviously each case will have to be judged according to its own merits and not all offenders who commit sexual offences in the intra-familial context would be deserving of such treatment.

23 Section 52 of the **Correctional Services Act** 111 of 1998 specifically includes as conditions relating to community corrections taking part in treatment, development and support programmes, contributing financially towards the cost of community corrections to which the prisoner has been subjected, etc.

43.4.10 Such outside-prison sentence also need not be a 'soft' option as it is possible for a trial court to impose strict conditions of correctional supervision upon even very serious offenders.²⁴ The active participation of the offender in sex offence specific treatment programmes should be a standard condition of such correctional supervision orders. The prospect of a suspended prison sentence being put into operation adds an added incentive to the offender to participate fully in treatment programmes and to comply with the terms of the correctional supervision order.

43.4.11 Although we recognise that section 276(3) of the **Criminal Procedure Act 51** of 1977 provides that a sentencing court may impose imprisonment together with correctional supervision,²⁵ it must be realised that the rehabilitation of sexual offenders is a long term strategy. Correctional supervision, on the other hand, is a rather short term solution as it can only be imposed for a fixed period.²⁶ For sexual offenders, this period may be too short to be really effective.

43.4.12 **Due to the imperative to ensure victim and community protection, the Commission recommends that as part of the original sentence of the court, all sexual offenders should be required to undergo treatment in an accredited treatment programme, preferably in a community setting, when released on parole or under correctional supervision. The Commission recommends that more extensive use be made of section 274(1) of the Criminal Procedure Act 51 of 1977 and expert opinion should be canvassed by the court when determining the appropriate treatment programme. We further recommend that the offender should, as far as possible, be liable for the costs of the treatment. If the offender does not have the means, then the State should bear the responsibility for the cost of treatment. It must also be stressed that we came to this decision after much soul searching, realising full well that our first priority is and should always be the victim and not the offender.**

24 See, for instance, **S v R** 1993 (1) SA 476 (A), 1993 (1) SACR 209 (A); **S v E** 1992 (2) SACR 625 (A).

25 See also **S v Van der Westhuizen** 1994 (1) SACR 191 (O).

26 In the case of the imposition of correctional supervision in terms of section 276(1)(h) of the **Criminal Procedure Act 1977** the maximum period is three years; where correctional supervision is imposed in terms of section 276(1)(i), the maximum period is five years.

43.4.13 In order to give effect to this recommendation, the Commission proposes the following amendments:

1. **Amendment of section 276A of Act 51 of 1977**

x. **Section 276A of the Criminal Procedure Act, 1977, is hereby amended -**

(a) **by the insertion after subsection (2) of the following subsection:**

(2A) Punishment imposed under subsections (1)(h) or (1)(i) of section 276 on a person convicted of any sexual offence shall, if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the attendance of and participation in a sex offence specific accredited treatment programme, the cost of which shall be borne by the convicted person himself or herself or the State if the court is satisfied that the convicted person has no adequate means to bear such cost. ;

2. **To address the concerns raised above regarding the shortness of the period for which correctional service may be imposed, it is recommended that section 276A(1)(b) of the Criminal Procedure Act 51 of 1977 be amended as follows:**

(b) **by the substitution for paragraph (b) of subsection (1) of section 276A of the following paragraph:**

(b) **for a fixed period not exceeding [three] five years.**

The inclusion of such a provision in the **Criminal Procedure Act 51 of 1977** will also necessitate defining what is meant by a 'sexual offence' and a 'sex offence specific accredited treatment programme'.

3. **Supervision of dangerous offenders**

3.1 Despite the new **Correctional Services Act 111 of 1998** and its elaborate provisions on community corrections and release from prison and placement under correctional

supervision and on day parole and parole, it is nevertheless necessary to recommend the inclusion of a substantive clause in the proposed Sexual Offences Act:

Supervision of dangerous sexual offenders

26. (1) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without the option of a fine, the court may order, as part of the sentence, that when such offender is released either after completion of the term of imprisonment or on parole, the Department of Correctional Services shall ensure that the offender is placed under long term supervision by an appropriate person.

(2) For purposes of subsection (1) a *dangerous sexual offender* includes an offender who has -

- (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a minor
- and *long term supervision* means supervision of a rehabilitative nature for a period of not less than five years.

(3) A long term supervision order given by a court in terms of this section must be reviewed by that court within three years from the date on which the order was given or within such shorter period as the court may direct.

(4) Upon giving a long term supervision order in term of this section, the court must explain to the complainant in the proceedings, including the next of kin of a deceased complainant, that they have the right to be present at the review proceedings referred to in subsection (3) and to make representations on the duration of the long term supervision order.

(5) Failure by a dangerous sexual offender to comply with a long term supervision order is an offence and the offender shall be liable, upon conviction, to a fine or to imprisonment for a period of two years or to both such fine and such

imprisonment, or to a community sentence which may include correctional supervision or community service.

3.2 Further, the Commission recommends that the Department of Correctional Services should, as a matter of priority, introduce and administer treatment and rehabilitation programmes for offenders and sexual offenders in particular. Staff who provide assessment and treatment services in the Correctional Services environment should be adequately trained and supported in this specialised field of work.

CHAPTER 44**THE NEED FOR A STATUTORY OFFENCE FOR HARMFUL NON CONSENSUAL HIV-RELATED BEHAVIOUR****44.1 Introduction**

44.1.1 The Discussion Paper on Sexual Offences: the Substantive Law did not contain proposals regarding the criminalisation of harmful HIV-related behaviour due to the fact that research on the topic of harmful HIV-related behaviour had already been undertaken by the Commission's Project Committee on HIV/AIDS. This Committee has recently compiled a Report containing the final recommendations of the Commission.¹ The Report on Aspects of the Law Relating to AIDS, however, only deals with consensual sexual activity and as such concludes that statutory intervention is neither necessary nor desirable. In that Report the Commission acknowledges that transmission of or exposure to HIV can occur during non-consensual sexual acts such as rape and that further measures in this regard will be dealt with under the Commission's investigation into sexual offences.

44.2 Current position

44.2.1 Theoretically non-consensual intentional or negligent exposure or transmission of HIV/AIDS could be prosecuted under one of the common law crimes of murder, culpable homicide, rape, assault and attempts to commit these crimes. However, the common law crimes do not seem to provide effective redress in the case of harmful HIV/AIDS-related behaviour. This is borne out by the fact that no successful prosecutions have been concluded so far which is presumably due to the difficulties relating to evidence and proof.

44.2.2 The only existing criminal law and procedure provisions relating to harmful HIV/AIDS-related behaviour are those dealing with bail and minimum sentences. Sections 1(b),

¹ South African Law Commission Fifth Interim Report on Aspects of the Law Relating to AIDS April 2001.

2 and 4(f) of the **Criminal Procedure Second Amendment Act** 85 of 1997 provides strict bail measures when an HIV infected accused is charged or convicted of rape.² If the accused knew that he had HIV or AIDS, the bail application must be considered by a regional court and the accused will not be entitled to bail unless he can satisfy the court that “exceptional circumstances exist” to justify bail being granted.

44.2.3 Currently the fact that an offender who rapes also has HIV/AIDS, is regarded as an aggravating factor at sentencing. In terms of section 51(1) read with Part 1 of Schedule 2 of the **Criminal Law Amendment Act** 105 of 1997 a person convicted of rape - knowing that he has HIV - is liable to an obligatory life sentence. Provision is however made for imposition of a lesser sentence if the court is satisfied that “substantial and compelling circumstances exist” justifying such lesser sentence. Nevertheless, even where an offender did not know that he had HIV, which means that the provisions referred to are therefore not applicable, the fact that a rapist has HIV/AIDS will necessarily be aggravating whether or not HIV was transmitted, in view of the added anguish and heightened risk to life and well-being imposed on the victim. The compulsory minimum life sentence for a person convicted of rape knowing that he has HIV/AIDS hardly seems a deterrent as the accused person is likely to die of HIV/AIDS before the conclusion of his sentence.

44.3 Comparative analysis

44.3.1 The position adopted by the United States Report of the 1988 Presidential Commission on the Human Immuno-deficiency Virus Epidemic as quoted in Hermann confirms that the criminal law has a role to play in protecting the community and punishing those who transgress:³

Just as other individuals in society are held responsible for their actions outside the criminal law's established parameters of acceptable behaviour, HIV- infected individuals who knowingly conduct themselves in ways that pose significant risk of transmission to others must be held accountable for their actions.

² The proposed definition of rape contained in the draft bill is gender neutral and therefore caters for women as accused. However in terms of the present definition only a man can commit the offence of rape and for this reason the accused is referred to as 'he'.

³ 1990 **St Louis University Public Law Review** at 352.

44.3.2 In Africa a firm stance is being taken against harmful HIV-related behaviour. The positions in Namibia, Zambia and Zimbabwe are briefly set out below.

44.3.3 Namibia

44.3.3.1 Following the 1997 Report by the Law Reform and Development Commission,⁴ the **Combating of Rape Act** 8 of 2000 was passed by the Namibian Parliament and came into operation on 5 June 2000. The draft Bill which preceded the Act included, as a “coercive circumstance”, the fact that the perpetrator knows that he or she is infected with HIV and does not disclose this fact prior to committing a sexual act, thereby constituting rape. The provision has not been included in the promulgated Act. This provision seems to have been aimed at consensual sexual acts and did not address exposure during non-consensual sexual acts.

44.3.3.2 The Act does, however, provide for a minimum sentence (15 years’ imprisonment in the case of a first conviction and 45 years for a subsequent conviction) for any person who is convicted of rape and who knew that he or she was infected with “any serious sexually transmitted disease” at the time of the commission of the offence.

44.3.4 Zambia

44.3.4.1 It has recently been reported that Zambia is planning to introduce a law to criminalise the deliberate spreading of HIV/AIDS, subjecting those found guilty to a prison term for up to 20 years.⁵ The Project Committee on Sexual Offences has not been able to obtain further information on the proposed legislation.

44.3.5 Zimbabwe

44.3.5.1 The Zimbabwean **Sexual Offences Act** No 8 of 2001 provides for the criminalisation of deliberate transmission of or exposure to HIV, and for specific sentences where the person convicted was infected with HIV.

44.3.5.2 The Act makes it a criminal offence for any person, having actual knowledge that

⁴ **Namibia Report on the Law Pertaining to Rape** 1997.

⁵ Pretoria News Friday November 2 2001 ‘Zambia plans law on HIV spread’

he has HIV, intentionally to do anything or permit the doing of anything which he knows or ought reasonably to know will infect another person with HIV or is likely to lead to another person becoming infected with HIV. It is a defence if the other party knew that the accused was infected with HIV and consented to the act in question, thus appreciating the nature of HIV and the possibility of infection.

44.3.5.3 Part V of the **Sexual Offences Act** No 8 of 2001 is dedicated to the prevention of the spread of HIV. The relevant sections provide as follows:

15 Deliberate transmission of HIV

(1) Any person who, having actual knowledge that he is infected with HIV, intentionally does anything or permits the doing of anything which he knows or ought reasonably to know -

- (a) will infect another person with HIV; or
- (b) is likely to lead to another person becoming infected with HIV;

shall be guilty of an offence, whether or not he is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.

(2) It shall be a defence to a charge of contravening subsection (1) for the person charged to prove that the other person concerned -

- (a) knew that the person charged was infected with HIV; and
- (b) consented to the act in question, appreciating the nature of HIV and the possibility of his becoming infected with it.

18 Presumptions regarding HIV infection

(1) For the purposes of sections fifteen and sixteen (sentence provision), the presence in a person's body of HIV antibodies or antigens, detected through an appropriate test or series of tests, shall be *prima facie* proof that the person concerned is infected with HIV.

(2) For the purposes of sections fifteen and sixteen, if it is proved that a person was infected with HIV within thirty days after committing an offence referred to in those sections, it shall be presumed, unless the contrary is shown, that he was infected with HIV when he committed the offence.

44.4 Evaluation and recommendations

44.4.1 Alarming research, reported in 1996 and 1997, found that AIDS -stricken teenagers in KwaZulu Natal are deliberately infecting others with HIV through sexual contact

in order not to die alone. According to the research, some teenage males are resorting to rape to spread the disease. Medical authorities cite their fear that men who have been tested positive for HIV respond to this HIV positive diagnosis by raping women as a main factor for not determining the HIV status of patients. Furthermore, an urban legend exists that if a man is HIV positive he can cure himself by having sexual intercourse with a virgin. A result of this myth is the rape of young girls thought to be virgins.⁶

44.4.2 Although it is recognised that an integrated public health approach has an important role to play, public health measures in themselves are insufficient to deal with the situation where persons deliberately put others at risk of HIV infection. The Project Committee on Sexual Offences is of the opinion that the criminal law undoubtedly has a role to play in protecting the community and punishing those who transgress.

44.4.3 Whilst exploring the reasons for punishment of sexual offenders who transmit or expose their victims to HIV/AIDS, one realises that the punishment for committing the sexual offence may act as a deterrent, but that the punishment for knowingly transmitting or exposing someone to HIV is purely retributive. The aim would be to add to society's condemnation of sexual offences by confirming that this form of conduct should not go unpunished.

44.4.4 Given the rampant spread of HIV it may be argued that the victim of a sexual offence may already have contracted HIV and may be charged with exposing the rapist to HIV/AIDS. However, the Project Committee on Sexual Offences is of the opinion that the HIV status of the victim should in no way benefit the sexual offender. What is in issue is the fact that the person despite knowledge of the fact that he or she is or may be infected, commits an offence by which the disease may be transmitted to another person.

44.4.5 As far as harmful HIV-related behaviour is concerned, sexual offences need specific attention as the risk of contracting HIV/AIDS is much greater during non-consensual sexual acts. The victim may be subjected to forced vaginal and or anal penetration, which as a result of the violent and non-consensual nature of the act may and often does lead to injuries making the possibility of transmission of HIV/AIDS much greater.⁷ Forced penetration of the

⁶ The most recent victim of this myth being the four year old daughter of an HIV positive man in Evaton E News 17th November 2001.

⁷ Discussion paper 80, par 2.39.

vagina or anus may be accompanied by extensive damage to these organs or may lead to abrasions or cuts. The possibility of transmission is heightened and consequently not comparable to consensual contact. However, even where the offender wears a condom during a sexual offence, the Project Committee on Sexual Offences is of the opinion that there should be no defence of diminished responsibility. The fact that the offender wore a condom may be taken into consideration at mitigation of sentence.

44.4.6 In regard to sexual offences the issue turns on the combatting of rape and sexual violence and providing redress to the victims of sexual offences as well as the use of the criminal law to discourage offenders or potential offenders with HIV/AIDS from raping or sexually abusing. The Project Committee on Sexual Offences finds that the existing bail provisions meet this objective. However, given the nature of this disease, the Project Committee on Sexual Offences considers the minimum sentencing provisions in this regard to be a concerted yet unsuccessful attempt at retribution. The Project Committee invites comment on whether society perceives the deliberate or reckless exposure to HIV/AIDS, as a result of a sexual offence, as an act which needs to be punished as a separate offence.

44.4.7 The Project Committee recommends that criminal sexual activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction. Two options seem viable in this context. Firstly, to introduce practical measures to ensure successful prosecution of harmful HIV-related behaviour in terms of existing common law crimes⁸ or, secondly, to create a separate offence specifically criminalising harmful HIV-related behaviour in the context of the commission of a sexual offence.

44.4.8 The Project Committee provisionally endorses the second option and in so doing prefers to use the broader concept of 'exposure' rather than the more limited 'transmission' of HIV. We provisionally propose to include both forms of *culpa*, i.e. intent and negligence, in our formulation. Intent includes *dolus eventualis*. *Dolus eventualis* is present where the accused foresaw the possibility that the prohibited consequence might occur, in substantially the same manner as that in which it actually does occur, or where the prohibited circumstances may exist and he or she accepts this possibility. Comment is invited on these options.

44.4.9 Linked to the second option is the question whether HIV should be singled out

⁸ As suggested in the Commission's Fifth Interim Report on aspects of the law relating to AIDS.

or whether any other life-threatening sexually transmissible disease should be included in the ambit of a separate offence. The Project Committee is of the opinion that HIV should not be singled out to the exclusion of any other life-threatening sexually transmissible disease or condition. Comment is also invited on this question.